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United States

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Circuit Court of Appeals

For the Ninth Circuit.

G. W. BRAINARD, as Trustee of the Estate of PACIFIC
CO-OPERATIVE LEAGUE STORES, a Corpora-
tion, Bankrupt,

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O. LLOYD,
FRANK W. LESNET, BERTHA A. BURGESS,
EDWARD BURGESS, W. A. GARA, T. Mc-
KIERNON, CLARENCE S. KING and J. H.
PHILLIPS,

Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, of an Order of the United States
Southern Division of the District
Court for the Northern Dis-
trict of California,
Third Division.

FILED

APR 25 1923

F. D. MONCKTON

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Circuit Court of Appeals

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In the United States Circuit Court of Appeals, for
the Ninth Circuit.

No. —.

G. W. BRAINARD, as Trustee of the Estate
of PACIFIC CO-OPERATIVE LEAGUE
STORES, a Corporation, Bankrupt,
Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O.
LLOYD, FRANK W. LESNET, BERTHA
A. BURGESS, EDWARD BURGESS, W. A.
GARA, T. McKIERNON, CLARENCE S.
KING and J. H. PHILLIPS,

Respondents.

Petition for Revision.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of G. W. Brainard, as trustee of the estate of Pacific Co-operative League Stores, a corporation, bankrupt, respectfully shows unto this Court:

I.

That on the 27th day of February, 1922, an involuntary petition in bankruptcy was filed against Pacific Co-operative League Stores, a corporation, bankrupt, in the District Court of the United States, in and for the Northern District of California, Southern Division, and thereafter and on the 15th day of March, 1922, the said District

Court made an order adjudicating the said corporation a bankrupt upon the said petition and referring further proceedings in the matter of the administration of the estate of the said bankrupt to A. B. Kreft, Esq., referee in bankruptcy of the said District Court.

That thereafter and on the 3d day of April, 1922, the said G. W. Brainard was appointed trustee of said bankrupt by its creditors at their first meeting, which said appointment was thereupon and upon said 3d day of April, 1922, approved by said referee.

That thereafter and within the time required by law said G. W. Brainard qualified as such trustee and ever since said time the said G. W. Brainard has been and now is the duly appointed, qualified and acting trustee of the estate of said bankrupt.

II.

That subsequent to the time of the filing of the aforesaid petition for an adjudication of said Company a bankrupt and within the time required by law, certain claimants filed in the said bankruptcy matter with the said referee their claims against the estate of said bankrupt for the respective amounts set opposite their names, to wit:

Floyd J. Irwin	\$ 72.00
J. H. Gosney	672.44
Fred O. Lloyd	100.00
Frank W. Lesnet	838.91
Bertha A. Burgess	75.00
Edward Burgess	75.00

W. A. Gara	162.50
T. McKiernon	16.25
Clarence S. King	700.00
J. H. Phillips	100.00

asserting the right to have the said claims allowed as priority in the sums filed up to the extent of \$300 under the provisions of Section 64-b (4) of the Bankruptcy Act.

That thereafter, upon the written stipulation filed herein, copy of which is hereto attached, marked "A" and hereby referred to and made a part hereof, and certain oral testimony offered before the referee, the matter was submitted and on the 27th day of October, 1922, the said referee made an order allowing as priority under said section of the Bankruptcy Act the said claims for the amounts filed, not to exceed the sum of \$300, copy of which is hereto attached, marked Exhibit "B" and hereby referred to and made a part hereof, which said order was filed on November 15, 1922.

III.

That thereafter and on the 16th day of November, 1922, the said trustee in bankruptcy filed with said referee his petition for review by the District Court of the said order of the said referee and thereafter and on the 17th day of January, 1923, the said referee filed in the said District Court his certificate on such review, a true copy of which said certificate, duly certified by the Clerk of said District Court, is hereto attached, marked Exhibit

“C” and hereby referred to and made a part hereof.

IV.

That thereafter and on the 26th day of March, 1923, the said District Court made an order in said matter affirming the said order of the said referee, a true copy of which said order, duly certified by the Clerk of said District Court, is hereto attached, marked Exhibit “D” and hereby referred to and made a part hereof.

Your petitioner charges the fact to be that said District Court erred as a mater of law in affirming the said order of the said referee for the following reasons, to wit:

(a) The said claimants and each and all of them were not workmen, clerks, traveling salesmen or servants of the bankrupt at the time the services mentioned in their respective claims were performed within the meaning of said Section 64-b (4) of the Bankruptcy Act, and the said claims should have been allowed as ordinary claims only and not entitled to priority under the said section of the Bankruptcy Act.

WHEREFORE, your petitioner, as such trustee in bankruptcy, feeling aggrieved because of said order of said District Court, asks that the same may be revised in matter of law by this Honorable Court as provided by Section 24-b of the Bankruptcy Act and the rules of practice in such cases provided, and that said order may be reversed, and for such other and further relief as may be just and proper.

Dated, April 4th, 1923.

JOS. KIRK,

CLARENCE A. SHURY,

Attorneys for G. W. Brainard, as Trustee of the
Estate of Pacific Co-operative League Stores,
a Corporation Bankrupt.

State of California,

City and County of San Francisco,—ss.

I, G. W. Brainard, trustee of the estate of Pacific Co-operative League Stores, a corporation, bankrupt, petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements therein contained are true to the best of my knowledge, information and belief.

G. W. BRAINARD.

Subscribed and sworn to before me this 4th day of April, 1923.

[Seal]

W. H. STEPHENS,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 4003. In the United States Circuit Court of Appeals for the Ninth Circuit. G. W. Brainard, as Trustee of the Estate of Pacific Co-operative League Stores, a Corporation, Bankrupt, Petitioner, vs. Floyd J. Irwin et al., Respondents. Petition for Revision. Filed Apr. 4, 1923. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

G. W. BRAINARD, as Trustee of the Estate of PACIFIC
CO-OPERATIVE LEAGUE STORES, a Corpora-
tion, Bankrupt,

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O. LLOYD,
FRANK W. LESNET, BERTHA A. BURGESS,
EDWARD BURGESS, W. A. GARA, T. Mc-
KIERNON, CLARENCE S. KING and J. H.
PHILLIPS,

Respondents.

Transcript of Record

IN SUPPORT OF

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Ap-
proved July 1, 1898, to Revise, in Matter of Law, of
an Order of the United States District Court
for the Southern Division of the
Northern District of Cali-
fornia, Third Division.

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

**Stipulation Re Testimony of R. H. Dobbs and Fred
O. Lloyd.**

It is hereby stipulated by the undersigned that the testimony of R. H. Dobbs and Fred O. Lloyd, hereto attached and made a part hereof, may be considered by the above Court as the evidence introduced by the respective parties hereto on the opposition of the trustee to the claims of Fred O. Lloyd, J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King, Floyd J. Irwin, W. A. Gara and Frank Leslet, against which written objections have been filed by the trustee.

It is also stipulated that upon said hearing the trustee waived all objections to the forms of said claims, and in particular waived any objection that might be based upon the fact that any of said claimants had not stated in his claim that he was entitled to priority, or had not designated himself, in his claim, as "clerk" or "salesman."

Dated: November 16th, 1922.

MARKS & COHEN,

Attorneys for Frank W. Lesnet.

JOSEPH KIRK and

CLARENCE A. SHUEY,

Attorneys for Trustee.

PERRY EVANS,

Attorney for J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King and Floyd J. Irwin. [1]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

Testimony of H. H. Dobbs.

H. H. DOBBS, being first duly sworn, testified as follows:

I was vice-president of the Pacific Co-operative League Stores, now bankrupt, from the date of its incorporation, and as such was familiar with and had charge of the employment of the managers for its various branches. The general duties of all of the store managers were to hire and dismiss employees, to purchase and pay for merchandise, to make certain reports daily, semi-monthly and monthly, depending on the character of the facts

to be reported, and to do all and everything that any clerk would do to successfully carry on the business of the branch. All of the acts of the managers were subject to the approval of the home office. The parent company kept the results of the business transacted by each branch separately.

The salaries of the managers averaged \$161.46 per month, depending on the volume of business of the branch and were specifically as follows, to wit: [2]

All the employees of the branch were absolutely subject to the orders of the branch manager, who employed his own men as he saw fit, fixing their salary and paying the same out of the receipts of the branch and accounting to the home office semi-monthly when he made a pay-roll report. [3]

The manager had full authority to make purchases for the branch, generally speaking. There were isolated cases where managers being advised that they could make certain purchases to greater advantage through the home office, placed an order through the home office, which was able to buy certain articles in large volume at a lesser cost. In such cases, when practical to do so, a branch was instructed to purchase through the home office.

The daily problems that came up in the branch were solved by the manager of the branch, he reporting, generally tri-weekly or monthly, as to what had been done in a general way. He had power to settle all details arising in the branch as any manager might do.

In the cases of the managers of Fresno, Calwa, Groveland and Tuolumne a greater portion of the merchandise was requisitioned through the home office owing to the fact that certain of the large wholesalers of San Francisco have a joint warehouse at Fresno from which merchandise could be delivered after purchased from the wholesaler in San Francisco. By purchasing through the home office it was able to obtain a better price from the wholesaler here on account of this fact than the branch could obtain independently. In this way particular branches were able to obtain the San Francisco price, which was cost of freight less than if the branch had purchased from other sources. No standard form was used by the branch as it was not a general practice of the league.

When Mr. Lloyd, the Fresno manager, was employed, he was told, as well as all other managers when employed, that their title was that of manager but they were given to understand that [4] because they were managers it did not mean that they were to stand around as floorwalkers, but were expected to do any and all work that would ordinarily be expected of a chief clerk, that is, they were expected to employ their full time at the branch and perform any work that became necessary for the success of the branch, employing such assistant clerical services as in their judgment was necessary to properly obtain the best results for the branch.

The managers had full charge to employ assistants. Occasionally the parent company would send

someone to the manager to fill a vacancy. If the manager felt that the man was suited for the position the manager employed him and fixed his salary and gave all orders of employment. The home office in no way limited the manager as to salaries except held the manager responsible for the results of the operation of the branch; that is, the home office held the managers to a certain percentage of overhead and the manager could adjust the salaries in such way as would bring the best results. The manager was required to keep the operating expenses of his branch in California at not to exceed eight per cent and at other places at not to exceed twelve per cent of the gross business done. The manager was not limited to amount of cash available for purchases but was permitted to buy to such extent as appeared reasonable or necessary for the business of the branch. If he over purchased and the home office was able, as it was in certain cases, to cancel the orders, such was done, and if not, warning was given to the manager that he should purchase less and if he did not do so would be subject to discharge.

The managers at Tucson, Orcutt, Maricopa and San Diego had cashiers who assisted the manager in his clerical work and in [5] certain cases in preparing reports which had to be verified and signed by the manager. So far as I know all of the managers used their best efforts to do everything that was necessary to make the branch successful by selling merchandise, arranging stock and such other work as is usually done in a store of a similar

character and size. The managers may have swept and dusted the stores if it appeared to them necessary and for the best interests of the branch that they do so. Every manager was working at the store in the same way that he would work if he was the owner of the store and desirous of realizing the best results from the business transacted by the store, being accountable to the home office for such results.

At Taft there was the manager and his wife and a delivery clerk. At Orcutt I believe there were four clerks assisting the manager; at Maricopa Mr. Gara had a cashier and by reason of this fact gave more time to meeting and waiting upon trade. He had practically exclusive power of management of the store subject to his reports being satisfactory. He had almost exclusive right to purchase whatever his needs might be to properly run the store at Maricopa. At Ferndale there was one assistant, at Rio Dell none, at Phoenix two, at Brae one, at Calwa none, except from time to time as necessary. At Carrizozo there was practically a one man store, that is, the manager did everything necessary to be done. There was no delivery and the volume was so small that the manager did not require any assistants. The power of all the managers was substantially the same. During the busy season a manager could employ more men, during the dull season less, and if the business did not warrant he was expected to transact all of the business himself, the object being that his branch should produce a profit. [6]

The usual amount paid to clerks was not to exceed \$110 nor less than \$80, the manager being left to decide what the proportionate amount should be that should be paid to clerks in order to keep the overhead at not to exceed eight or twelve per cent of the gross returns as before stated. One of Mr. King's assistants at the Orcutt store received a salary of \$125 or \$130. As a general practice Mr. King, at Orcutt, made out his own daily report in his own writing. In a few instances these reports were made out by the cashier but always signed by Mr. King. In Mr. King's absence his cashier would make up the report.

None of these managers were officers or members of the Board of Directors. San Diego had three stores under one manager, each store having a chief or senior clerk who was accountable to the manager. None of the clerks had any authority to buy, fix prices or to employ other help in the store.

Irwin and Mrs. Bertha Burgess were not managers; that was a temporary condition. Irwin was merely acting manager. I knew nothing about this arrangement until after his claim was filed. I presumed Mr. Frank Wagner was still manager there until this claim came in; he was manager until shortly before this bankruptcy proceeding and placed this man Irwin in charge without knowledge of the office.

The managers at Fresno and Calwa were under written contract of yearly employment under which they received a fixed salary which was to be in-

creased when the business and sales were raised so that eight per cent of the gross sales would exceed said fixed salaries. [7]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, Bankrupt.

Testimony of Fred O. Lloyd.

FRED O. LLOYD, age 31, residence Greenville, Fresno County, being first duly sworn, testified as follows:

I was employed by Mr. Rawitzer, assistant to the President. Mr. Dobbs and Mr. Ames stated to me that the business had been running more wide open than was proper and that the men employed would be held to a closer account; that while my position was that of a manager I was to understand that I came under the direct supervision of the home office and that the position which I was to hold was more of a chief clerk than manager; that I was to take charge of the store and do what local buying was necessary making daily reports to the home office; that I should anticipate my purchases a week ahead and make requisition on the home office on everything except perishable merchandise. Mr. Phillips was employed the same time and under the same instructions.

I opened the store in the mornings and swept out and dusted, having one man who did the delivery work for the store and who arrived there in the morning in time to assist in sweeping out and arranging the store for the business of the day. I waited upon customers. The other man was out delivering merchandise most of the time. I worked from eight until six, sometimes going back in the evening to make up my reports.

[Endorsed]: Filed Nov. 17, 1922, at 9 o'clock and 30 min. A. M. A. B. Kreft, Referee in Bankruptcy. [8]

Exhibit "B."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE LEAGUE STORES, Bankrupt.

Order of Referee Allowing Priority to Certain Claims.

The petition of the trustee herein for disallowance of the certain claims filed against the above estate, to wit:

Floyd J. Irwin.....	\$ 72.00
J. H. Gosney	627.44
F. Lloyd	100.00
Frank W. Lesnet	838.91
Bertha A. Burgess	75.00

Edward Burgess	75.00
W. A. Gara	162.50
T. McKiernon	16.25
Clarence S. King	700.00
J. H. Phillips	100.00

coming on regularly to be heard this 27th day of October, 1922, at 10 o'clock A. M. of said day and due notice of the hearing having been given as required by law, and C. A. Shuey appearing on behalf of the trustees and Perry Evans appearing as attorney for J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King and Floyd J. Irwin, and George Gordon appearing as attorney for W. A. Gara, and Marks & Cohen appearing as attorneys for Frank Leslet and W. E. Gearhart for F. Lloyd and the remaining claimants above named having failed to appear personally or through any representative, and testimony having been offered by the trustee and others present, and the matter having been submitted, now after due consideration; [9]

IT IS HEREBY ORDERED that all of the claims above enumerated be allowed the priority claimed up to the extent and not to exceed the sum of \$300.00;

IT IS FURTHER ORDERED that any sums remaining due in excess of the sum of \$300.00 be allowed as an ordinary claim entitled to participate in dividends paid herein.

Dated: October 27, 1922.

A. B. KREFT,
Referee.

[Endorsed]: Filed Nov. 15, 1922, at 2 o'clock and
— Min. P. M. A. B. Kreft, Referee in Bank-
ruptcy. [10]

Exhibit "C."

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN BANKRUPTCY—No. 12,435.

In the Matter of PACIFIC CO-OPERATIVE
LEAGUE STORES, a Corporation, Bank-
rupt.

Referee's Certificate on Petition to Review.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States for
the Northern District of California:

The undersigned, Referee in Bankruptcy, to whom
was referred the above-entitled matter, respectfully
certifies and reports:

That on the 27th day of October, 1922, an order
was made by the Referee herein allowing as labor
claims entitled to priority under Section 64-b of
the Bankruptcy Act the claims of Floyd J. Irwin
and others, set out in the order allowing the same,
filed on November 15th, 1922; that G. W. Brainard,
trustee of the above-named bankrupt, within time
granted by the Referee on November 16, 1922,
filed his petition to review said order.

The review concerns only such portion of the claims as represent labor earned within three months of the filing of the petition herein, not exceeding the sum of \$300.00 to any claimant. The trustee contends that these claims come within the ruling in the case of *Blessing vs. Blanchard et al.* (C. C. A. 9th Circuit, 35 A. B. R. 135), that the claimants are managers of branches of the bankrupt's business, and that such managers are not workmen, clerks and servants within the meaning of Section 64-b (4).

Upon the hearing C. A. Shuey, Esq., appeared as counsel for the trustee, Perry Evans, Esq., appeared for claimants [11] J. H. Gosney, Bertha A. Burgess, Edward Burgess, Clarence S. King, and Floyd J. Irwin; Messrs Marks & Cohen appeared as counsel for Frank W. Lesnet, and W. E. Gerhart, Esq., appeared as counsel for Fred O. Lloyd and J. H. Phillips.

The testimony taken upon the hearing has not been reported. A stipulation as to the evidence introduced has been signed and filed between the trustee and claimants represented by Perry Evans and Messrs. Marks & Cohen. W. E. Gerhart representing Lloyd and Phillips declined to sign a stipulation, and as to these claims the matter was submitted, leaving the Referee to state the facts. No matters were brought out affecting the credibility of witnesses. It is unnecessary for the Referee to make a summary of the testimony as the stipulation of the evidence is in itself a summary. I will hereinafter make a statement re-

specting the claims not included in the stipulation of evidence. There are certain facts concerning the character of the organization of the bankrupt and the business transacted by it which are not covered by the stipulation, and which in my opinion are material on this question of relation of employer and employee. In the year of 1913 there was formed under provisions of Section 653-b of the Civil Code of California a co-operative business association under the name of Pacific Co-operative League. The association consisted of seven members who were its directors, and a large number of associate members. The League established a chain of some thirty-seven grocery stores in the states of California, Oregon, Arizona, New Mexico and Nevada. The funds to establish such stores were obtained from its associate members who paid a membership fee of ten dollars and advanced as loan capital sums of money from fifty dollars upwards. [12]

The league had divisions referred to as educational division, fraternal division, and wholesale division, the latter being a purchasing division for the League. A sum exceeding two hundred and seventy-five thousand dollars was paid in by the associate members and denominated as loan capital. Persons experienced in the grocery business were employed under the designation of managers to take charge of and conduct said stores. Their compensation was at a stated monthly or weekly salary; the average salary paid such managers, as appears from the stipulation, was \$161.40 per month. In

some cases it was agreed that the salary would be increased where the same could be done under a basis of eight per cent on the gross sales. However, the business in no instance resulted in such increase. The League found itself restricted by reason of its form of organization in the obtaining of credit, and in the year 1921 a California corporation was organized under the name of Pacific Co-operative League Stores, the bankrupt herein. The original League had also been adjudged bankrupt and stands referred to the undersigned. The capital stock of the League Stores, corporation, was divided into 650,000 shares of common stock and 350,000 shares of preferred stock. Over 90 per cent of the associate members, numbering over 12,000, exchanged loan certificates in the League for shares of preferred stock in the League Stores, representing a par value of about \$275,000, so exchanged. The League had local boards, which acted upon educational and fraternal features of the organization; the League Stores had no local boards. The principal place of both the League Stores and the League was San Francisco. One E. O. F. Ames was appointed general manager of the League Stores Corporation. The League Stores Corporation issued eight per cent cumulative preferred stock, after the payment of which the common stock was entitled to receive six per cent; after such payment the surplus was to be divided equally between [13] the common and the preferred. As preferred stock was sold a like number of shares of common stock was issued, and placed in es-

crow with three trustees approved by the League, which trustees were also directors of the League, and directors of the League Stores; such stock being placed in escrow for the benefit of the League in order that the League might distribute the profits of the business to the purchasing members. By virtue of such common stock the League controlled the League Stores corporation. All stockholders of the League Stores, both common and preferred, became associate members of the League. Upon the formation of the League Stores Corporation there was transferred to it from the League the assets of some thirty-seven stores. The various managers of these stores continued to be managers after the transfer. It will be seen from the foregoing that the corporation, the League Stores, was but an instrument of the League instituted for convenience in the transaction of its business, and to better carry out its associate purpose.

For the benefit of Lloyd and Phillips, who have not signed the stipulation of evidence, I state the following:

The substance of the testimony of H. H. Dobbs, vice-president of the League Stores, is that a person given title of manager was placed in charge of a store with authority to conduct its business; if he needed assistance he was authorized to hire them, and discharge them; that he was to purchase whatever the store required in the way of merchandise or to requisition the same from the home office under certain circumstances; that as long as the manager made good he was not interfered with.

I quote the following from page 3 of the stipulation:

When Mr. Lloyd, the Fresno manager, was employed, he was told, as well as all other managers when employed, that their title was that of manager but they were given to understand that because they were managers it did not mean that they were to stand around as [14] floorwalkers, but were expected to do any and all work that would ordinarily be expected of a chief clerk, that is, they were expected to employ their full time at the branch and perform any work that became necessary for the success of the branch, employing such assistant clerical services as in their judgment was necessary to properly obtain the best results for the branch.

The quotation accords with my recollection with the addition that Mr. Dobbs explained that one of his reasons for telling them that while their title was manager, their duties were those of a chief clerk, was that he wanted them to understand that the home office did not consider itself bound by everything they might do. That the nature of the grocery business was such that it was of advantage for the managers to purchase certain classes of goods from the traveling or local representatives of wholesalers. That purchases should appear in the daily reports of the managers to the home office. If a manager in the opinion of the home office purchased too heavily his purchases were cut down. If the report was received too late to countermand

the order, the manager was cautioned or reprimanded, or even discharged. That the League Stores Corporation found it to advantage to buy in large quantities certain staples through the home office when in need of such goods the managers would requisition the home office. Mr. Lloyd testified in substance:

“I was employed by Mr. Rawitzer, assistant to the President, Mr. Dobbs and Mr. Ames stated to me that the business had been running more wide open than was proper and that the men employed would be held to a closer accounting; that while my position was that of a manager I was to understand that I came under the direct supervision of the home office and that the position which I was to hold was more of a chief clerk than manager; that I was to take charge of the store and do what local buying was necessary, making daily reports to the home office; that I should anticipate my purchases a week ahead and make requisition on the home office on everything except perishable merchandise. Mr. Phillips was employed the same time and under the same instructions. I opened the store in the mornings and swept out and dusted, [15] having one man who did the delivery work for the store and who arrived there in the morning in time to assist in sweeping out and arranging the store for the business of the day. I waited upon customers. The other man was out delivering merchandise most of the time. I worked from

eight until six, sometimes going back in the evening to make up my reports.”

As to the claims of Bertha Burgess and Floyd J. Irwin, I quote the following from the stipulation of Mr. Dobbs’ testimony:

“Irwin and Mrs. Bertha Burgess were not managers; that was a temporary condition. Irwin was merely acting manager. I knew nothing about this arrangement until after his claim was filed. I presume Mr. Frank Wagner was still manager there until this claim came in; he was manager until shortly before this bankruptcy proceeding and placed this man Irwin in charge without knowledge of the office.”

This statement it seems to me in itself overcomes the trustee’s objection. The trustee, however, has included these claims in the review.

As to the claim of Frank Lesnet, in charge of the store at Carrizozo, New Mexico, Mr. Dobbs testified as follows:

“At Carrizozo there was practically a one man store that is, the manager did everything necessary to be done. There was no delivery and the volume was so small that the manager did not require any assistant. The powers of all of the managers were substantially the same. During the busy season a manager could employ more men, during the dull seasons less, and if the business did not warrant he was expected to transact all of the

business himself, the object being that his branch should produce a profit.”

As to Phillips in charge at Calwa, California, the same statement applies. Mr. Phillips had no clerk except from time to time as necessary. Edward Burgess at Ferndale had one assistant. J. H. Gosney at Brae, California one assistant. Clarence S. King at Orcutt, Mr. Dobbs stated he believed, had four clerks assisting him. (See page five of stipulation.)

The salaries paid the claimants are as follows:
[16]

Fred O. Lloyd	\$175.00 a month
J. H. Gosney	160.00 a month
Bertha A. Burgess	35.00 a week
Edward Burgess	35.00 a week
Clarence S. King	200.00 a month
W. A. Gara	200.00 a month
Frank Lesnet	160.00 a month
J. H. Phillips	160.00 a month

In my opinion the facts disclosed do not bring this case within the ruling of *Blessing vs. Blanchard*, *supra*. Blanchard was general manager of all of the business of the bankrupt on a salary of \$300.00 a month. Here the bankrupt's business consists of a chain of stores, under direction of a general manager who would correspond to Blanchard. The persons in charge of the stores it seems to me correspond more with the case of Winn, also in the Blanchard case, who was superintendent of the shop with authority to hire and dis-

charge his assistants, but who worked along with them, and who in that case was granted priority.

From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen, and a responsibility to make good, for which the salary paid was a very moderate compensation. At the bottom they are the servants of the 12,000 members of the League employed by their subsidiary in the carrying out of their associate enterprise. They are not the managers of that enterprise or of the League Stores Corporation. As persons in charge of the respective stores their authority is so far subordinated to the head office that the designation as "chief clerk" described their position more accurately than the title "manager," and according to the testimony of Mr. Dobbs they were treated as chief clerks in charge by the head office.

Dated: January 17, 1923.

Respectfully submitted,

A. B. KREFT.

Referee in Bankruptcy.

[Endorsed]: Filed Jan. 18, 1923, at 2 o'clock and 30 Min. P. M. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [17]

Exhibit "D."

At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty-three—Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 12,435.

In the Matter of CO-OPERATIVE LEAGUE STORES, etc., in Bankruptcy.

Minutes of the Court—March 26, 1923—Order Affirming Certificate of Referee.

Pursuant to oral opinion this day rendered; it is ordered that the certificate of the Referee on Review as to certain claims, heretofore submitted, be and the same is hereby affirmed. [18]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing eighteen pages contain full, true and correct copies of Stipulation relating to and testimony of R. H. Dobbs and Fred O. Lloyd (Exhibit "A").

Order of Referee allowing priority to certain claims (Exhibit "B").

Certificate of Referee on petition to review (Exhibit "C").

Minute order, affirming the certificate of Referee (Exhibit "D")

in the Matter of PACIFIC CO-OPERATIVE LEAGUE STORES, in Bankruptcy, No. 12,435, as the same now remain on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 5th day of April, A. D. 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

[Endorsed]: Petition for Revision and Transcript of Record in Support Thereof. Filed April 4, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. W. BRAINARD, as trustee of the estate of
PACIFIC CO-OPERATIVE LEAGUE STORES (a
corporation, bankrupt),

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O.
LLOYD, FRANK W. LESNET, BERTHA A. BUR-
GESS, EDWARD BURGESS, W. A. GARA, T. MC-
KIERNON, CLARENCE S. KING, and J. H.
PHILLIPS,

Respondents.

BRIEF FOR PETITIONER.

JOSEPH KIRK,

CLARENCE A. SHUEY,

Attorneys for Petitioner.

FILED

WILLIAMS

U. S. DEPARTMENT OF JUSTICE

No. 4003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. W. BRAINARD, as trustee of the estate of
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KIERNON, CLARENCE S. KING, and J. H.
PHILLIPS,

Respondents.

BRIEF FOR PETITIONER.

Statement of the Case.

The bankrupt was engaged in buying and selling merchandise throughout the Pacific Coast States and conducted more than thirty-seven (37) branch stores in this territory, a complete statement of the character of which business is contained in the Referee's certificate and stipulation of facts therein referred to and appearing in Transcript Ex. "A"

p. 9 and Ex. "C" p. 19. Said bankrupt had in charge of each of these stores a manager. The respondent managers have filed with the Referee in Bankruptcy claims against the bankrupt's estate asserting right of priority payment under the provisions of Section 64b of the Bankruptcy Act. The trustee contested their right to priority and after hearing the Referee allowed their respective claims as entitled to priority. (Tr. Ex. "B" p. 17.)

Section 64b (4) of the Bankruptcy Act provides as follows:

"The debts to have priority * * * and to be paid in full out of bankrupt estates, and the order of payment shall be * * * wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300.00 to each claimant."

The trustee filed with the Referee his petition for a review by the District Court of the order allowing these claims priority and the Referee prepared and filed in the District Court his certificate on review wherein are set forth the facts adduced at the hearing with the stipulation of facts presented thereupon as aforesaid.

A hearing was had before the District Judge and an order made affirming the order of the Referee. (Tr. p. 29.) The matter is now before the Circuit Court of Appeals upon the trustee's petition for a revision of the order of the District Court.

Specification of Error Relied Upon.

The Referee and the District Judge erred in allowing the claims of respondents as entitled to priority under Section 64b of the Bankruptcy Act for the reason that said respondents were not workmen, clerks, traveling or city salesmen, or servants within the meaning of Section 64b (4).

Brief of the Argument.

The manager of a corporation employed to perform services as herein set forth is not entitled to priority.

- Collier on Bankruptcy, 11th Ed. p. 1009;
 - In re Blessing v. Blanchard, C. C. A. 9th Circuit, 35 A. B. R. 135, 223 Federal 35;
 - In re Ladies Shoppe Inc., 49 A. B. R. 268, Sept. 22, 1922, D. J. Delaware;
 - In re Greenberger, 30 A. B. R. 117, 203 Fed. 583;
 - In re Albert O. Brown, 22 A. B. R. 496, 171 Fed. 281;
 - In re Crown Point Brush Co., 29 A. B. R. 638, 200 Federal 889.
-

Argument.

A manager, such as claimants herein, is not entitled to priority. Collier on Bankruptcy, 11th Ed. p. 1009 says:

“The words are used in their popular sense, and should be construed to mean just what they

are popularly understood to mean; that is, only those who work, labor, or serve in a more or less subordinate capacity. Dictionaries should be consulted as well as cases.”

In the case of *Blessing v. Blanchard, et. al.*, C. C. A. 9th Circuit, 35 A. B. R. 135, 223 Federal 35, this Court in reversing the Referee whose decision is now before this Court on review and also the Honorable Judge Dooling of the District Court, said:

“The word ‘servant’ often has a broad and inclusive meaning and in a sense it may be said to include all employees in the service of another, and also the officers of corporations. It is very clear, however, that it is not used in that sense in the section under consideration. Although the word ‘servant’ is broader than the term ‘house servant’ as used in the act of 1867, it was not intended by its use in the act of 1898 to include all employees; otherwise, there would have been no necessity for a specific mention of workmen or clerks or salesmen. We think the word ‘servant’ should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. *We do not think it includes the manager of a business notwithstanding that he may also have rendered services as a salesman.*”

In the case of *Ye Ladies Shoppe, Inc.*, 49 A. B. R. 268, contained in the advanced sheets of February, 1923, Volume 49 A. B. R. Number 4 at page 269, a petition to review an order of the Referee in Bankruptcy denying priority to a claim amounting to two hundred and three dollars and twenty-five

cents (\$203.25) was filed. The Referee in denying priority, held that the claimant was not within the class of persons entitled to priority. The Court said:

“In considering whether the debt due claimant is entitled to priority of payment, I shall assume, without deciding, that the fact that a claimant is an officer and director of a corporation neither disables the corporation from employing him as a workman, clerk, traveling or city salesman, or servant, nor disentitles him to priority for wages due for services performed in any of the latter capacities. In *re H. O. Roberts Co.* (D. C., Minn.), 27 Am. B. R. 437, 193 Fed. 294; in *re Swain Co.* (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749; In *re Eagle Ice & Coal Co.* (D. C., Pa.), 39 Am. B. R. 184, 241 Fed. 393. The question remaining is whether the wages due one employed as “manager and buyer and saleswoman” are entitled to priority. It is now well settled that wages due for services rendered as manager of a corporation are not entitled to priority of payment. In *re Bonk* (D. C., Mich.), 46 Am. B. R. 503, 270 Fed. 657; *Blessing v. Blanchard* (C. C. A., 9th Cir.), 35 Am. B. R. 195, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341; In *re Greenberger* (D. C., N. Y.), 30 Am. B. R. 117, 203 Fed. 583; In *re Crown Point Brush Co.* (D. C., N. Y.), 29 Am. B. R. 638, 200 Fed. 882; In *re Albert O. Brown & Co.* (D. C., N. Y.), 22 Am. B. R. 496, 171 Fed. 281; In *re Grubbs-Wiley Grocery Co.* (D. C., Mo.), 2 Am. B. R. 442, 96 Fed. 183.

I think it clear that the contract under which claimant performed her services was an entire contract, and not a severable or divisible one, and that compensation for her services in the several capacities thereunder may not be apportioned. 6 R. C. L. p. 858; 7 A. & E. Enc.

of Law (2d Ed.), p. 95 et seq.; Elliott on Contracts, Section 1543. However that may be, no apportionment was made or attempted to be made, in the proof of claim or in the agreed statement of facts, between what is due to her for her services as manager and what is due to her for her services as buyer and saleswoman. Consequently, as she is not entitled to priority for the wages due her as manager, and as her claim may not be apportioned, or at least has not been apportioned, she has failed to establish a right to priority with respect to any part of her claim. In re Swain Co. (D. C., Cal.), 28 Am. B. R. 66, 194 Fed. 749, relied upon by the claimant, no portion of the claim was for services rendered in an employment not embraced within section 64b (4) of the Bankruptcy Act.

The order of the referee must be affirmed."

In the case of Greenberger, 30 A. B. R. 117, 203 Federal 583:

"This manager kept the accounts and managed the business, except that he did not hire or discharge help or pay the bills for goods, as a rule. However, he was the manager, and managed the business. He had a regular salary as such manager. * * * In addition to the performance of his duties as manager he sold goods and kept the store clean for the reason that he would not turn this duty over to the lady clerks. It appears fairly from the evidence that the clerical work performed by him as well as the work done in keeping the store clean, was merely incidental to the performance of his duties as manager of the store. He was not employed as a cleaner or workman or clerk, and so far as appears all that he did in selling goods and cleaning the store was voluntary on his part. The fact that, as inci-

dent to the performance to his duties as general manager of this store he kept it clean and did some clerical duty does not change the character of his employment. He was not employed to do that work but to manage the business and he was paid for managing it and not for performing such menial services as he did perform as incident to the management. The claim is for salary and for salary as manager not for services as a clerk or general workman and compensation as such. * * * It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority, for the reason that he incidentally sweeps the floor, dusts the counter and sells the goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the Bankruptcy Act giving priority to workmen, clerks, salesmen, and servants."

In the case of Albert O. Brown, 22 A. B. R. 496, 171 Federal 281:

"It is quite clear that Olmsted is not a 'workman', nor is he a 'servant' because the term does not include all instances of the formal relation of master and servant. * * * The only thing left that he could be, therefore, is a 'clerk'. No one would think of calling the manager in charge of the Chicago branch of a broker's office a 'clerk'—he himself least of all. Whether or not he is employed for 'wages' he is much distinguished from a clerk."

In the case of Crown Point Brush Co., 29 A. B. R. 638, 200 Federal 889:

"A person might be employed by a corporation to do service as general manager or assist-

ant general manager for six hours each day and as a common laborer or workman the balance of the day; but it would be incumbent on the claimant, in order to establish priority as a workman, to establish that he was employed, hired in the dual capacity, and show how much of his agreed compensation, wages, or salary was for his services as workman."

Respondents were in every sense of the word managers. They were employed as such and held and exercised the title, powers, duties, and responsibilities of a manager. They were known throughout the whole organization and in every branch community as such. They passed finally upon all the local problems of the branch that came up before them daily for decision. They ordered merchandise, fixed prices for sale of same, and had absolute authority over the many details of the business of the branch. They had full authority to employ and discharge such assistants as were necessary for the best interests of the branch, the home office holding the managers to a certain percentage of overhead and the managers had the authority to adjust salaries in such a way as would bring the best results. The manager was required to keep the operating expenses of his branch in California at not to exceed eight (8) per cent and at other places not to exceed twelve (12) per cent of the gross business done.

They kept or caused to be kept books of the branch making certain reports to the home office daily, semi-monthly, or monthly. They attended

to banking of receipts from sales and collections, and were responsible to the home office, their only superior located in San Francisco and in most cases hundreds of miles distant. In brief, they had all the responsibilities and performed all the duties of an ordinary proprietor of a store similar to and in competition with the branch. While they were expected to use any spare time in waiting on customers, arranging stock, and any other work which an ordinary proprietor of a similar store would do, these duties were only incidental to their duties as manager and were in nowise to interfere with such duties. The home office held them responsible not for so many hours work but for results through their operation of the branch. They were expected to make their branch prosper in competition with proprietors of similar stores who it is well known work long hours, perform incidental work to that of their proprietorship in order to earn a profit which usually is little more than a living for themselves and families. These managers when they were employed knew they were to perform similar duties and were willing to accept similar reward.

In conclusion, the best authorities hold that Congress in granting priority to the few named, intended to limit priority to these in exclusion of all others, or otherwise words of a general character would have been used. The facts show beyond the slightest doubt that these respondents were clothed with absolute powers, duties, and responsibilities customarily held by a manager or proprietor and

that they were paid for such in excess of the clerks who worked in the organization. To allow these managers, clothed with this authority, such priority, is in direct conflict with the opinion of this Court in the case of Blessing v. Blanchard and that the order of the District Court should be reversed.

Dated, San Francisco,
May 7, 1923.

Respectfully submitted,
JOSEPH KIRK,
CLARENCE A. SHUEY,
Attorneys for Petitioner.

No. 4003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. W. BRAINARD, as trustee of the estate of
PACIFIC CO-OPERATIVE LEAGUE STORES (a
corporation, bankrupt),

Petitioner,

vs.

FLOYD J. IRWIN, J. H. GOSNEY, FRED O.
LLOYD, FRANK W. LESNET, BERTHA A. BUR-
GESS, EDWARD BURGESS, W. A. GARA, T. MC-
KIERNON, CLARENCE S. KING, and J. H.
PHILLIPS,

Respondents.

BRIEF FOR RESPONDENTS.

PERRY EVANS,

*Attorney for Respondents,
Floyd J. Irwin, J. H.
Gosney, Bertha A. Bur-
gess, Edward Burgess
and Clarence S. King.*

W. E. GEARHART,

*Attorney for Respondents,
Fred O. Lloyd and J. H.
Phillips.*

AARON N. COHEN,

*Attorney for Respondent,
Frank W. Lesnet.*

GEORGE GORDON,

*Attorney for Respondent,
W. A. Gara.*

No. 4003

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KIERNON, CLARENCE S. KING, and J. H.
PHILLIPS,

Respondents.

BRIEF FOR RESPONDENTS.

The order of the Referee, granting these claimants priority, was based upon the proposition that these claimants were *clerks*, because their work was essentially that of clerks, notwithstanding they were sometimes designated as "managers" of the branch stores of the bankrupt concern and performed certain minor and incidental duties of a managerial character, such as making up reports (oftentimes

after their regular hours: Tr. p. 17), and supervising the other clerks.

From the Referee's certificate we quote as follows:

"From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen. * * * They are not the managers of that enterprise or of the League Stores Corporation. As persons in charge of the respective stores their authority is so far subordinated to the head office that the designation as 'chief clerk' described their position more accurately than the title 'manager', and according to the testimony of Mr. Dobbs they were treated as chief clerks in charge by the head office" (Tr. p. 28).

The District Court, upon the trustee's petition for a review, affirmed the order of the Referee without making any findings.

Questions for Consideration.

A. Were these claimants "clerks"? If so, there is an end to the controversy, because the statute expressly grants priority to "workmen, clerks", etc. (Bankruptcy Act, Sec. 64b; 9 U. S. Comp. Stat. Ann. (1916), Sec. 9648).

B. Is the question just propounded a "matter of law" or a mere question of fact? For only a "matter of law" can be considered in this proceeding.

Respondents' Points.

A. The decision of the lower court was correct in holding that these claimants were clerks.

B. The only point involved is one of fact, namely, whether or not the work of these claimants was that of "clerks". The finding that their work was that of clerks cannot be reviewed by this proceeding, which is solely to "revise in matter of law" (Bankruptcy Act, sec. 24b; 9 U. S. Comp. Stat. Ann. (1916), sec. 9608), and the petition, therefore, should be dismissed.

A.

THE DECISION OF THE DISTRICT COURT WAS CORRECT.

In support of the decision of the District Court, we submit the following comment:

1. Managerial Duties Merely Incidental.

The fact that an employee whose essential duties are those of a clerk and salesman may also perform incidental or minor duties as a manager will not deprive him of his right to priority:

"It seems to me, on the evidence, that everything done by him as the manager of the Portland office was subordinate to the work he did as traveling salesman, and inconsiderable in comparison with that portion of his work."

In re Gay, 188 Fed. 392, 394.

Where it appeared that a claimant was both president and manager of a bankrupt corporation, but

“that he also acted in the capacity of clerk in the store of said company under an agreed salary of \$200 per month * * * that his services as manager were nominal, * * * that the claimant was obliged to discharge the duties as manager (to the extent that a manager’s services were required), in addition to his duties as clerk,”

and that it was “small services” which his position as manager required, it was held, by the District Court of this district, in an opinion written by Judge Dooling, that the claimant was entitled to priority:

In re Capital Paint Co., 239 Fed. 424.

“If the principal services rendered by the claimant have been performed in any such capacity [as clerk or salesman], then the preferred character of the claim for such work is not affected by the fact that the claimant also incidentally and secondarily to the occupation and work for which and in which he was engaged, and for which said compensation is claimed, performed supervisory or even managerial duties and powers.”

In re Cost Cut Counterbore Co., 283 Fed. 670, 671-2.

And even where a person is employed as “consulting engineer and rubber expert”, if his duties ultimately become mainly manual he is entitled to priority, notwithstanding his somewhat exalted title, according to the Circuit Court of Appeals for the Sixth Circuit in

Emerson v. Castor, 236 Fed. 29, 40.

2. Supervision of Other Employees Not Irreconcilable With Position of Clerk.

That some of these claimants had other clerks employed by them and working under their directions is not a circumstance that can have the effect of transforming them into anything more lofty than clerks, for clerks and salesmen they continued to be. See *In re Cost Cut Counterbore Co.*, supra, where it appeared that the claimant "had two men working under him as such sales manager" (p. 670). See also *Blessing v. Blanchard*, 223 Fed. 35, cited by petitioner, where the claimant Winn, who was "superintendent" of the shop and "had authority to hire and discharge the men in his department", was nevertheless granted priority, since he did "the same kind of work in the shop as did the men who worked under him" (p. 36).

3. Power to Purchase Supplies.

The authority to purchase goods is in no way controlling. If a cook in a household or in a hotel be given authority to do all the ordering of food, does that fact transform him into a "manager"? Is he any the less a "servant"? Similarly, a clerk may be a purchasing clerk. Petitioner states in his brief (p. 8) that these claimants, in addition to ordering merchandise, "fixed prices for sale of same." We do not consider this a very important factor, but inasmuch as petitioner seems to consider it so, we think it proper to state that we find no such evidence in the record. It is, on the contrary, more

than probable, and at least we are entitled to presume from the record, that the selling prices were fixed under direction of the business managers, either by correspondence or through visiting supervisors.

4. Facts of the Case.

All of these so-called "managers" were told, when they were employed, that they "were expected to do any and all work that would ordinarily be expected of a chief clerk" (Stipulation concerning testimony, Tr. p. 12); and the Referee's certificate, from which we have quoted in the opening paragraph of this brief, contains, as we have seen, this finding of fact:

"From the testimony I gather that the position of these claimants mainly called for hard work as clerks and salesmen" (Tr. p. 28).

5. Petitioner's Authorities Distinguished.

The cases cited by the petitioner are all readily distinguishable. We have no dispute with the ruling of the *Blessing* case, 223 Fed., to the effect that the word "servant", as used in the statute under consideration, is to be given a limited meaning, that it is not synonymous with "employee", and that a "general manager", employed as such, at a salary of \$300 per month, is neither a servant nor a salesman, "notwithstanding that he may *also* have rendered services as a salesman" (pp. 36, 37; italics ours). The general manager in that case "had the general control and direction of the workmen in the employment of the bankrupt in all its departments"

(p. 36). It is clear from this statement that his services as salesman must have been minor and incidental, and that his position was much more important than that of a "clerk".

In *Ye Ladies Shoppe, Inc.* (now reported in 283 Fed. 693), the agreed statement of facts showed that the claimant who asked for priority was one of the incorporators of the company, a director of the company, its president, and the owner of one-third of its capital stock (283 Fed. 694). She was employed as "manager *and* buyer and saleswoman", and in presenting her claim

"no apportionment was made or attempted to be made * * * between what is due to her for her services as manager and what is due to her for her services as buyer and saleswoman" (p. 694).

Consequently, there was no basis for the court holding in that case, as the Referee and District Court have held in this case, that the services as manager could be disregarded, as being minor and incidental.

In the *Greenberger* case, 203 Fed., as appears from the quotation from the opinion in petitioner's brief, the general manager of the store, where the clerks were all women, "as incident to the performance of his duties as general manager", kept the store clean, and "did some clerical duty". But it is distinctly stated that

"*He was not employed to do that work, but to manage the business, and he was paid for*

managing it and not for performing such menial service as he did perform as incident to the management" (p. 584; italics ours).

Quite different from the present case, where, as the Referee certifies, "*the position of these claimants mainly called for hard work as clerks and salesmen.*"

Petitioner is then driven to go so far afield as to cite *In re Albert O. Brown & Co.*, 171 Fed. 281, to the effect that the manager in charge of the Chicago office of a New York brokerage firm, who would of necessity be an important business executive, is not a "clerk". We readily concede this, but point to the great dissimilarity between such a position and that of a man engaged in handling groceries in a country store and selling them over the counter, which was what these claimants were hired to do.

Finally, *In re Crown Point Brush Co.*, 200 Fed. 882, is cited to the effect that one might be employed a definite number of hours as a general manager or assistant general manager, and a definite number of hours as a workman, in which case he would be allowed priority for a portion, only, of his entire compensation. But in this case the work of these claimants was at all times essentially that of clerks and salesmen, and for no portion of the time worthy of notice were they performing any "managerial" duties. They come, therefore, within the principle of the cases cited under subdivision "1", *supra*.

6. Conclusion on the Facts.

These claimants are people dependent on their labor for their daily bread, and the law grants them priority for that reason. It may lessen the amounts payable to the general creditors, but the hardships of bankruptcy must fall somewhere. It may be that some of the general creditors have suffered losses they can ill afford—others may give no second thought to their unprofitable venture. But they have taken their chances, while these claimants were shielded against the element of chance, to the extent of their wages for a definite period, by the provisions of the law. This court, we trust, will not demolish that shield, merely because these clerks and salesmen have been called “managers” of the several branch stores, when their duties were essentially those not of officials, but of working people.

B.

THE PETITION SHOULD BE DISMISSED.

We have briefed the case upon its merits before setting forth our reasons for asking dismissal of the petition, in order that it may plainly appear that the matter sought to be reviewed is solely a question of fact: namely, was the work of these claimants that of clerks? Questions of fact cannot be debated on a petition for revision:

“In the case of original petition this court has authority to review merely a matter of law

arising in the course of the proceeding below. The latter is intended as a summary mode of reviewing any supposed erroneous holding upon a question of law, and *does not contemplate a review of the facts* * * * The petition in such case should state specifically the question of law which was involved and was ruled upon by the court below, and should be accompanied by a certified copy of so much of the record as will exhibit the manner in which the question arose, and its determination. Such question of law, so presented, is the question and the only question that can properly be ruled upon by this court upon an original petition."

In re Richards, 96 Fed. 935, 937 (italics ours).

The Circuit Court of Appeals, Sixth Circuit, speaking through Judges Taft, Lurton and Day, quotes the above ruling, and says:

"This meets with our approval, and properly indicates the character of question which may be thus reviewed, and a proper mode of presenting it. The facts as they appear from the order sought to be reviewed, or as stated in the opinion of the court, or in the summary of evidence certified by the referee, where it appears that the order of the referee was reviewed by the district judge only upon such summary certified to him, *must be treated as settling the facts* upon which the 'matter of law' arises which is sought to be reviewed."

Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brew. Co., 101 Fed. 699, 703 (italics ours).

This court, speaking through Judges Ross, Gilbert and Morrow, has said:

“As in the case a consideration of the facts is essential to any review of the decision of the court complained of, it is clear that the appeal cannot be treated as a petition for revision, as is suggested by the appellant may be done. That is only permissible where questions of law only are involved. * * *

“In the light of these authorities, it seems that the case at bar is not appealable under section 25a of the bankrupt act, and, as the record shows that the asserted lien of the appellant depends upon controverted facts, it clearly is not subject to revision under section 24b.”

Gaudette v. Graham, 164 Fed. 311, 312, 314.

And this court again (Judges Gilbert, Morrow and Rudkin) holds:

“But in a proceeding of this kind [review] we are neither required nor permitted to review the testimony.”

Olmsted-Stevenson Co. v. Miller, 231 Fed. 69, 70.

Followed, in the Eighth Circuit, in

Wm. R. Moore Dry Goods Co. v. Brooks, 240 Fed. 943, 945.

And from the Circuit Court of Appeals, Second Circuit, we quote as follows, in four cases:

“This being a petition to revise, we take the facts as found below. Our power is limited to correction in matters of law. Therefore we do not consider the suggestion that some at least

of the sums claimed were received by Bolognesi during insolvency and under circumstances raising a trust *ex maleficio*. The master has found the evidence the other way, and we cannot say that such finding amounted to error of law upon the testimony."

In re A. Bolognesi & Co., 254 Fed. 770, 772.

"* * * it is of course well settled that in the case of a petition for revision, as the statute confers jurisdiction 'to superintend and revise in matters of law' it does not contemplate any review of the facts by the appellate court, and only questions of law decided by the court below can be brought up for revision in this mode."

In re Nagel, 278 Fed. 105, 107.

"The court, on petition to revise, cannot review questions of fact, but only questions of law."

In re B. & R. Glove Corporation, 279 Fed. 372, 375.

"It is well settled that in these proceedings on petition to review in matter of law, the master's findings of fact, approved by the District Judge, are not brought up for review."

In re Caponigri, 183 Fed. 307, 308.

The Circuit Court of Appeals, Fifth Circuit, speaking to the same point, says:

"In a petition to review a referee's order in bankruptcy, affirmed in the District Court, the jurisdiction of the Circuit Court of Appeals is

limited to the facts as found by the referee and in the trial court.”

Whitney Cent. Trust & Sav. Bank v. United States C. Co., 250 Fed. 784, 787.

See, also

Bassett v. Evans, 253 Fed. 532, 533;

Ross v. Stroh, 165 Fed. 628, 630.

As there are no findings, and this court is not called upon to review the testimony, no matter of law is properly presented, and the petition should be dismissed.

Dated, San Francisco,

May 28, 1923.

Respectfully submitted,

PERRY EVANS,

*Attorney for Respondents,
Floyd J. Irwin, J. H.
Gosney, Bertha A. Bur-
gess, Edward Burgess
and Clarence S. King.*

W. E. GEARHART,

*Attorney for Respondents,
Fred O. Lloyd and J. H.
Phillips.*

AARON N. COHEN,

*Attorney for Respondent,
Frank W. Lesnet.*

GEORGE GORDON,

*Attorney for Respondent,
W. A. Gara.*

United States
Circuit Court of Appeals⁴
For the Ninth Circuit.

HENRY RITTER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED
APR 19 1973
F. B. WASHINGTON
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY RITTER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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vs.

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Upon Writ of Error to the United States District
Court of the District of Nevada.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. BOYD & CURLER, Reno, Nevada, and
Honorable M. A. DISKIN, Carson City, Nevada,

For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United
States Attorney for the District of Nevada,
Reno, Nevada, and Honorable C. A. CANT-
WELL, Assistant United States Attorney for
the District of Nevada, Reno, Nevada,

For the Defendant in Error. [1*]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

**Indictment for Violation of the National
Prohibition Act.**

United States of America,
District of Nevada,—ss.

Of the May Term of the District Court of the
United States of America, in and for the District
of Nevada, in the year of our Lord one thousand
nine hundred and twenty-two,—

*Page-number appearing at foot of page of original certified Transcript of Record.

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That Henry Ritter and D. Church, hereinafter called the defendants, heretofore, to wit: On or about the 10th day of May, A. D. 1922, at Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [2]

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

SECOND COUNT.

That Henry Ritter and D. Church, hereinafter called the defendants, heretofore, to wit: On or about the 8th day of May, A. D. 1922, at Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and

before the finding of this indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent, or more of alcohol by volume, fit for use for beverage purposes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,

United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing Indictment: P. E. DuBois, Thos. Scott, P. Nash, A. Carter, Henry Ritter.

[Endorsed]: No. 5593. United States District Court, District of Nevada. The United States of America vs. Henry Ritter and D. Church. Indictment for Violation of the National Prohibition Act. A True Bill. W. P. Harrington, Foreman. Filed this 13th day of May, A. D. 1922, E. O. Patterson, Clerk. Feb. 19, Four months W. Co. jail.
[3]

Bench Warrant.

UNITED STATES OF AMERICA,

District of Nevada.

To the Marshall of the United States for the District of Nevada, and to his Deputies, and any or either of them, GREETING:

WHEREAS, at a District Court of the United

States of America, begun and held at Carson City, Nevada, within and for the district aforesaid, on the 1st day of May, 1922, the Grand Jurors in and for said district brought into said court a true bill of indictment against Henry Ritter and D. Church, charging them with the crime of having on or about May 10, 1922, at —, in the county of Washoe, District of Nevada, violated the National Prohibition Act as by said indictment now remaining on file and of record in said Court more fully appears, to which indictment the said Henry Ritter and D. Church hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said Henry Ritter and D. Church and bring them before said Court in Carson City, Nevada, to answer unto said indictment May 16, 1922, or, if — requires it that you take — before the Judge of said court, or any United States Commissioner in said district, that — may give bail in the sum of — present bail sufficient to answer said indictment.

WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal thereof hereunto affixed, at Carson City, Nevada, this 13th day of May, 1922.

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy.

GEORGE SPRINGMEYER,

U. S. Attorney. [4]

[Endorsed]: No. 5593. United States District Court, District of Nevada. The United States vs. Henry Ritter and D. Church. Bench Warrant. Filed on return this 20th day of May, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy Clerk.

Criminal Docket No. 3422.

MARSHAL'S RETURN.

Executed the within Bench Warrant on the within named defendants at Carson City, Nevada, on the 19th day of May, 1922, and I now have them before the U. S. District Court at Carson City, Nevada, this 19th day of May, 1922.

J. H. FULMER,
U. S. Marshal.
By J. P. Fodrin,
Deputy.

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Demand.

To Honorable GEO. SPRINGMEYER, United States Attorney.

To Honorable CHARLES A. CANTWELL, Assistant United States Attorney.

The defendants above named hereby respectfully

demand that you furnish to said defendants a bill of particulars in reference to the second count of the indictment heretofore returned against said defendants by the Grand Jury in the above-entitled court.

(1) You are respectfully requested and demand is hereby made upon you for a statement in writing setting forth the name or names of the party or parties to whom said alleged intoxicating liquors were sold by these defendants on the 8th day of May, 1922, within Washoe County.

(2) The names of the witnesses upon whose testimony you will rely to establish the facts set forth in the second count of said indictment.

(3) A brief statement of the testimony which said witness or witnesses will testify to in support of the said second count of said indictment.

(4) A statement as to whether or not said alleged sale so alleged to have been made was made by bottle or by drink.

This demand is made for the reason and upon the grounds that said second count of said indictment and the allegations [5] therein set forth are not definite, and that the recitals therein are vague and in such general terms that these defendants are not advised and cannot ascertain therefrom the particular matters which they will be required and called upon to defend concerning, and upon the further grounds that these defendants did not have a preliminary examination and were not arrested upon the date the said alleged sales took place.

It is respectfully requested that we be advised

within a reasonable time your action in reference to this demand.

Respectfully submitted,

BOYD & CURLER,

M. A. DISKIN,

Attorneys for Defendants.

Service of the above and foregoing demand is hereby acknowledged this 27th day of May, A. D. 1922.

GEORGE SPRINGMEYER,

U. S. Attorney.

[Endorsed]: 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Demand. Filed May 29, 1922, E. O. Patterson, Clerk. By O. E. Benham, Deputy. [6]

In the District Court of the United States for the District of Nevada.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Verdict (Henry Ritter).

We, the jury in the above-entitled case, find the defendant Henry Ritter guilty as charged in the first count of the indictment; and guilty as charged in the second count.

Dated this 16th day of December, 1922.

H. D. JOHNS,
Foreman.

[Endorsed]: No. 5593. U. S. District Court,
District of Nevada. The United States vs. Henry
Ritter and D. Church. Verdict. Filed this 16th
day of Dec., 1922. E. O. Patterson, Clerk.

In the District Court of the United States for the
District of Nevada.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Verdict (D. Church).

We, the jury in the above-entitled case, find the
defendant D. Church not guilty as charged in the
first count of the indictment; and not guilty as
charged in the second count.

Dated this 16th day of December, 1922.

H. D. JOHNS,
Foreman.

[Endorsed]: No. 5593. U. S. District Court,
District of Nevada. The United States vs. Henry
Ritter and D. Church. Verdict. Filed this 16th
day of Dec., 1922. E. O. Patterson, Clerk. [7]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

**Defendant Henry Ritter's Exception to the Refusal
of the Court to Give to the Jury an Instruction
Requested by Said Defendant.**

BE IT REMEMBERED, that heretofore, to wit,
and on the 15th day of December, A. D. 1922, in the
above-entitled court, the above-entitled case, wherein
United States of America was plaintiff and Henry
Ritter and D. Church were defendants, came on for
trial before a jury upon an indictment theretofore
returned by the Grand Jury charging the defend-
ants and each of them with unlawfully in violation
of the National Prohibition Law, disposing of in-
toxicating liquors, containing more than one-half of
one per cent alcohol per volume fit for use for bev-
erage purposes, and charging the said defendants
with having in their possession the said intoxicating
liquors, and thereafter testimony was introduced on
behalf of the plaintiff, and the Government having
rested its case, testimony was introduced on behalf
of the defendants and each of them, whereupon the
Court proceeded to instruct the jury with reference
to the law applicable to said case, and that prior to
the time the Court instructed the said jury the de-

fendants presented to the Court a written instruction upon the law applicable to the use of a decoy, and that thereafter, and in the presence of the jury, and at the conclusion of instructing said jury by said Court, the defendants requested that the Court then and there give to the jury the instruction theretofore presented to the court by the said defendants, and in the presence of the [8] jury and before the jury retired to consider the same, the Court then and there refused to give to the jury defendants' proposed instruction assigning as the reason therefor that the instruction did not contain the law of this Circuit to which action of the Court in the presence of the jury and before the jury retired to consider the said case, the defendant Henry Ritter then and there excepted to the action of the Court in refusing to give the said proposed defendants' instruction, to which exception was then and there allowed by the Court, and the said instruction so refused by the Court was then and there filed with the clerk of said court, and

NOW, on this 18th day of December, A. D. 1922, and within the time allowed by law, the defendant, Henry Ritter, presents this his written exception to the failure of the Court to give to the jury the said proposed instruction, and the refusal of which the said Henry Ritter duly excepted to the said instruction so refused by the Court, to which defendant excepted, which said instruction was then and there filed with the clerk, is in words and figures as follows, to wit:

“INSTRUCTION REQUESTED BY DEFENDANT TO BE GIVEN TO THE JURY BY THE COURT:

Under the second count of the indictment the defendant Henry Ritter is charged with having on a day specified sold intoxicating liquor containing more than one-half of one per cent of alcohol per volume and fit for use for beverage purposes.

The defendant Henry Ritter claims that he was entrapped into selling the liquor through the instigation of the prohibition officers, and that the liquor would not have been sold at all, if it had not been for the importunities of the prohibition officers who went to his place for the purpose of buying liquor.

You are instructed that if you believe from the evidence, [9] that defendant was induced by the importunities of the Government agent or agents to violate the law, and that through the instigation of agent Scott or DuBois or both of them, representing the prohibition department, the defendant Ritter, was induced to sell the liquor and that defendant Ritter would not otherwise have violated the law, then you should return a verdict of not guilty, as it is the policy of the United States Courts not to uphold a conviction in any case where the offense was committed through the instigation of the Government agents.”

[Endorsed]: Filed December 16th, 1922. E. O. Patterson, Clerk.

WHEREFORE defendant, Henry Ritter, respectfully requests that this, his exception, be allowed by the Court and filed with the Clerk.

M. A. DISKIN and
JAMES T. BOYD,

Attorneys for Defendant, Henry Ritter.

Service of the within and foregoing exception admitted this 18th day of December, A. D. 1922.

GEORGE SPRINGMEYER,
United States Attorney.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Defendant's Bill of Exceptions. M. A. Diskin, and James T. Boyd, Attys. for Deft. Henry Ritter, Reno, Nevada. Filed Dec. 18, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [10]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

HENRY RITTER and D. CHURCH,
Defendants.

**Order Extending Time to and Including February
15, 1923, to File Bill of Exceptions.**

Good cause appearing therefor, it was hereby or-

dered that the defendant, Henry Ritter, be and he is hereby given up to and including the 15th day of February, A. D. 1923, in which to prepare, serve and file his bill of exceptions in the above-entitled case.

Dated, January 8th, 1923.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Order Extending Time to File, etc. Filed Jany. 8th, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attys. for Deft. Henry Ritter, Reno, Nevada. [11]

In the District Court of the United States for the
District of Nevada.

February Term, 1923.

Honorable E. S. FARRINGTON, Judge.

Violation National Prohibition Act.

No. 5593.

UNITED STATES OF AMERICA

vs.

HENRY RITTER and D. CHURCH.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, Henry Ritter, have been indicted by the Grand Jury, impaneled in and by this court for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; and unlawfully, wilfully and knowingly selling intoxicating liquor; said crimes having been committed on the 8th and 10th days of May, 1922, at Washoe County, State and District of Nevada, and within the jurisdiction of this Court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Four (4) months from and after this date.

Dated and entered Feb. 19, 1923.

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy. [12]

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—May 13, 1922—Order for Capias
Issue.**

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, IT IS ORDERED that a capias issue herein returnable Tuesday, May 16th, 1922, at ten o'clock A. M., and IT IS FURTHER ORDERED that the present bond of the said defendants be, and the same are hereby, considered sufficient and may remain the same.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—May 16, 1922—Arraignment.

These defendants appeared this day with their attorney, Mr. James T. Boyd, and were thereupon duly arraigned upon the said indictment as re-

quired by law. They each declared their true name to be as stated in the indictment. Upon motion of Mr. Boyd, IT IS ORDERED that these defendants be, and they are hereby, granted to and until Friday, May 19, 1922, at ten o'clock A. M. within which to enter their pleas. [13]

Indictment for Violation of National Prohibition Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—May 19, 1922—Entry Pleas of Not Guilty.

These defendants appeared this day with their attorney, Mr. James T. Boyd, and were thereupon duly arraigned upon the said indictment as required by law. They each declared their true name to be as stated in the indictment and each entered their plea of not guilty as charged in the indictment. Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the bond of each of these defendants be, and the same is hereby raised to and fixed at Fifteen Hundred (\$1,500.00) Dollars.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—May 27, 1922—Order Setting
Trial Date.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on July 29, 1922, at ten o'clock A. M. [14]

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—June 8, 1922—Order Re Bill
of Particulars.**

IT IS ORDERED that the Government will comply with the demand for a bill of particulars in as far as the first and second paragraphs thereof are concerned; but the third and fourth requests are denied.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—July 24, 1922—Order Setting
Date of Trial.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on September 11, 1922, to follow case No. 5568.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—November 20, 1922—Order Set-
ting Date of Trial.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on November 12, 1922, to follow case No. 5656.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—December 8, 1922—Order Set-
ting Date of Trial.**

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on December 14, 1922, at ten o'clock A. M.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—December 15, 1922—Trial.

This cause coming on regularly for trial this day, Mr. George Springmeyer, United States Attorney appeared for and on behalf of the plaintiff; Messrs. J. T. Boyd and M. A. Diskin for the defendants,—the defendants being personally present. The following named jurors were accepted by the parties and duly sworn to try the issue, viz.: Henry D.

Johns, Floyd L. Booe, Fred Andresen, Chas. Wm. Jacobsen, M. Jacobsen, Fred Henrichs, Wyman Evans, Howard Sullivan, Fred Allerman, H. Rabe, J. H. Hoopes and R. Fulstone. The indictment was read to the jury by the clerk and the pleas of the defendants was stated. Upon motion of Mr. Diskin all witnesses were marshalled, sworn and placed under the rule, to wit: P. Nash, Thomas Scott, P. E. DuBois, H. P. Brown, A. Carter, Harry Grier and R. Burris, for the plaintiff; and H. H. Kennedy, R. Kirman, Harry Gosse, T. J. Steinmetz, A. H. Howe for defendants. These witnesses were admonished by the Court and excluded from the courtroom. All [16] of the witnesses for plaintiff were called in turn and in addition thereto Mr. Ira L. Swearingen was also sworn and during this testimony plaintiff offered in evidence one quart bottle one-half full of red liquor, admitted and ordered marked Plffs. Ex. No. 1; one small individual bottle about half full of red liquor, admitted and ordered marked Plffs. Ex. No. 2; two one-gallon demijohns full of red liquor, admitted and ordered marked Plffs. Ex. No. 3. Stipulation by counsel that all the liquor here offered in evidence in these exhibits is corn whisky containing over 45% alcohol by volume and is fit for use as a beverage. Plaintiff rests. All of defendants' witnesses were called in turn and in addition thereto Dr. H. E. Reid was sworn and testified. At 4:30 o'clock P. M. the jury was admonished by the Court not to talk among themselves about this case nor to allow others to talk to them or in their presence about

it and to refrain from making up their minds as to what their verdict would be until the case is finally submitted to them, etc., and they were excused until to-morrow morning at ten o'clock.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—December 16, 1922—Trial (Continued).

This case coming on regularly for further trial this day, the same counsel, the defendants and the jury being present. The defendants D. Church and Henry Ritter were each duly sworn and testified in turn on behalf of the defendants. Defendants rest. No [17] further testimony being adduced, and after argument by counsel for the respective parties the case was submitted. Thereupon, and after hearing the instructions given by the Court, the jury retired in charge of the Marshal to deliberate on the case and at 3:08 P. M. came into Court with the following verdict, viz.: "In the District Court of the United States for the District of Nevada. The United States vs. Henry Ritter and D. Church. No. 5593. We, the Jury in the above-entitled case, find the defendant, Henry Ritter, Guilty

as charged in the first count of the indictment; and guilty as charged in the second count. Dated this 16th day of December, 1922, H. D. Johns, Foreman.” “In the District Court of the United States for the District of Nevada. The United States vs. Henry Ritter and D. Church. No. 5593. We, the jury in the above-entitled case, find the defendant D. Church, not guilty as charged in the first count of the indictment; and not guilty as charged in the second count. Dated this 16th day of December, 1922. H. D. Johns, Foreman,”—and so they all say.

IT IS ORDERED that the defendant D. Church be, and he is hereby, discharged and his bond fully exonerated. IT IS FURTHER ORDERED upon motion of Mr. Diskin that the time for passing sentence upon the defendant, Henry Ritter be, and the same is hereby set for January 8th, 1923, at ten o'clock A. M. Mr. Diskin gives notice of his intention to move for a new trial and losing that he will appeal. IT IS ORDERED that the defendant's bond on appeal and to act as supersedeas be, and the same is fixed at Five Thousand Dollars (\$5,000.00). [18]

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court — January 6, 1923 — Order Continuing Time to and Including February 15, 1923, to Prepare, Serve and File Bill of Exceptions.

Good cause appearing therefor, it was hereby ordered that the defendant, Henry Ritter, be and he is hereby given up to and including the 15th day of February, A. D. 1923, in which to prepare, serve and file his bill of exceptions in the above-entitled case.

Indictment for Violation of National Prohibition Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—February 13, 1923—Order Continuing Time to and Including February 19, 1923, for Passing of Sentence.

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that the time for passing sentence upon the defendant Henry Ritter be, and the same is hereby, continued to and until February 19, 1923, at ten o'clock A. M. [19]

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

**Minutes of Court—February 19, 1923—Judgment
Order.**

This defendant, H. Ritter, appeared this day with his attorney, Mr. James D. Boyd, who presented a motion in arrest of judgment; Mr. George Springmeyer, United States Attorney appeared for plaintiff and opposed to the motion. Upon the conclusion of the argument by counsel for the respective parties, the motion was submitted to and by the Court **ORDERED** denied. Thereupon Mr. Boyd presented his motion for a new trial which was also argued by counsel for the respective parties, submitted to and by the Court denied. Thereupon, and this being the time heretofore appointed for passing sentence upon the said defendant, the Court pronounced judgment as follows, addressing the defendant: In consideration of the law and the premises, **IT IS HEREBY ORDERED AND ADJUDGED** that you be imprisoned in the county jail of Washoe County, Nevada, for the period of four months from and after this date. **IT IS FURTHER ORDERED** that the bond of this defendant be, and the same is hereby, fixed at Four Thousand

(\$4,000.00) Dollars and the same to act as a supersedeas bond. Upon the petition filed herein IT IS ORDERED that defendant be, and he is hereby allowed a writ of error. And IT IS FURTHER ORDERED that the defendant may have to and until March 1, 1923, within which to file his settled bill of exceptions herein. [20]

Indictment for Violation of National Prohibition Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—March 3, 1923—Order Continuing Time to and Including March 5, 1923, to Prepare, Settle and File Bill of Exceptions.

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that defendant have to and until March 5, 1923, to prepare, settle and file his bill of exception.

Indictment for Violation of National Prohibition Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—March 5, 1923—Order Continuing Time to and Including March 20, 1923, to Prepare, Settle and File Bill of Exceptions.

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that defendant have to and until March 20, 1923, to prepare, settle and file his bill of exception.

Indictment for Violation of National Prohibition Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—March 19, 1923—Order Continuing Time to and Including March 24, 1923, to Prepare, Settle and File Bill of Exceptions.

Upon motion of Mr. George Springmeyer, United States Attorney, IT IS ORDERED that defendant have to and until March 24, 1923, to prepare, settle and file his bill of exception. AND IT IS FURTHER ORDERED that defendant be, and he is hereby, allowed to and until April 19th within which to file his record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit. [21]

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—March 22, 1923—Order Continuing Time to and Including March 29, 1923, to Prepare, Settle and File Bill of Exceptions.

Upon motion of Mr. James D. Boyd, attorney for defendant, consent thereto being given by Mr. George Springmeyer, United States Attorney, IT IS ORDERED that defendant have to and until March 29, 1923, to prepare, settle and file his bill of exception.

Indictment for Violation of National Prohibition
Act.

No. 5593.

THE UNITED STATES

vs.

HENRY RITTER and D. CHURCH.

Minutes of Court—March 29, 1923—Order Continuing Time to and Including March 30, 1923, to Prepare and File Amendments to Bill of Exceptions.

Upon motion of Mr. George Springmeyer, United States Attorney, consent thereto being given by

Mr. James D. Boyd, attorney for defendant, IT IS ORDERED that plaintiff have to and until March 30, 1923, within which to prepare and file his amendments to the bill of exception and to settle bill of exception to be filed upon that day. [22]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Motion in Arrest of Judgment.

Now comes Henry Ritter, one of the defendants in the above-styled cause against whom a verdict of guilty was rendered in said cause on the 16th day of December, A. D. 1922, and, before judgment is pronounced upon him, moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him for the following reasons:

I.

Because the bill of indictment in this cause, and the first count of said indictment, wherein defendant is sought to be charged with unlawful possession of intoxicating liquor, is insufficient to support any judgment against him in this, to wit:

The indictment does not recite facts on said first count sufficient to constitute a public offense

for the reason that possession is charged in Washoe County, Nevada, no place therein being designated and no averments or allegations are contained in said indictment which negatives the assumptions of fact, that said liquor charged to be in the possession of defendant may have been possessed by him in his private dwelling; the allegation in said indictment that said possession was unlawful and in violation of the prohibition law is the statement of a conclusion.

II.

Because the bill of indictment under the second count is insufficient to support any judgment against defendant in this, to wit: [23]

Said second count attempts to charge an alleged sale of intoxicating liquor in that defendant in violation of law did unlawfully sell intoxicating liquor fit for use as a beverage; the said allegations are insufficient in that there is no allegation or statement that said liquor so alleged to have been sold, was sold with the knowledge on the part of the seller (the defendant); that it was to be used for beverage purposes; or that the liquor so sold was used for beverage purposes.

In support of these two counts, the Court is respectfully referred to the testimony given in the case and the objections interposed by defendant at the outset of the trial, wherein counsel for defendant objected to the introduction of any evidence to support the allegations of the indictment, for the reason that the indictment failed to state facts sufficient to constitute a public offense and,

therefore, all testimony in support of the indictment was irrelevant, incompetent and immaterial.

III.

That the evidence introduced establishes that the defendant, Ritter, had been entrapped by prohibition officers into the commission of the alleged crime charged in the second count of the indictment, and under which the jury found the defendant guilty.

The defendant, Henry Ritter, therefore prays that this motion be sustained and that the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just or proper in the premises.

Dated February 15th, A. D. 1923.

BOYD & CURLER,
Per JAMES T. BOYD,
Attorneys for Defendant.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Motion in Arrest of Judgment. Filed Feb. 19, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [24]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Motion for New Trial.

Comes now Henry Ritter, one of the defendants above named, and moves the Court that a new trial be granted for the following reasons and on the following grounds, to wit:

I.

That the Court erred in its decision upon questions of law arising during the course of the trial.

II.

That the Court erred in refusing to give to the jury the instruction requested by the defendant in reference to the use of a decoy.

III.

That the verdict of the jury is contrary to law.

IV.

That under the testimony admitted to sustain the second count of the indictment the verdict be set aside for the reason that the defendant, Ritter, was entrapped and persuaded by Government agents to commit the act which the jury found him guilty.

V.

That the verdict of the jury is contrary to the evidence.

BOYD & CURLER,
Per JAMES T. BOYD,
Attorneys for Defendant.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church. Motion for New Trial. Filed Feb. 19, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [25]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY RITTER and D. CHURCH,
Defendants.

Assignment of Errors.

And now comes Henry Ritter, the plaintiff in error, and in connection with his petition for a writ of error says that in the record, proceedings and judgment aforesaid, error has intervened to his prejudice, to wit:

I.

The Honorable E. S. Farrington, Judge of the District Court of the United States, as aforesaid,

erred over the objection and exception of the defendant in admitting the following evidence testified by Thomas Scott, a witness, upon the part of defendant in error, which is as follows:

“Q. Now what occurred when you drank this corn whiskey, as you call it?

“A. I retained the bottle, which was full with the exception of three or four glasses that had been taken out of it, and I walked over to Mr. Ritter, took a warrant from my pocket, handed him a copy of it; he was leaning against the end of the bar, and I informed him I was a Federal agent, and the house was in the custody of the Government. I then stepped to the door where Mr. DuBois was, and requested Mr. DuBois to call the rest of the men; in the meantime I turned to Mr. Burris, Mr. Grier and the other gentleman and I told them, gentlemen, you are at liberty to leave if you wish, but if you wait until the rest of the boys come I don't know what action they will take; so they left. Agent Nash [26] came along first, the other three agents following him; I handed the bottle to Mr. Nash, also the original search-warrant, and informed Mr. Nash that Mr. Church had sold the drinks.

Mr. DISKIN.—We object.

Mr. SPRINGMEYER.—(Q.) Was this in the presence of Mr. Church and Mr. Ritter?

A. They were in the same room.

Q. Did they hear?

A. They could not very well not have heard it.

Q. What language did you use?

Mr. BOYD.—We object to what language he used. You can't define the crime by the language used by this witness after the commission of the offense, it is merely descriptive of what has transpired.

The COURT.—Have you any authority that a statement made in the presence of the defendants is inadmissible for that reason?

Mr. BOYD.—No, sir; it is a general proposition.

The COURT.—I know of no authority. A statement made with reference to the commission of an offense in the presence of the defendant has always been admissible in this court. If there is a rule to the contrary I would like to see it.

Mr. BOYD.—I haven't those at my fingertips, but we make the objections just the same.

The COURT.—You should always anticipate the Court is ignorant on matters of that kind, and needs instruction. The objection will be overruled.

Mr. BOYD.—Exception.

Mr. SPRINGMEYER.—(Q.) Please answer the question.

A. When Mr. Nash came in the door I handed him the bottle and warrant, with the remark, 'Here is the bottle and the warrant, Mr. Church served the liquor, Mr. Ritter got

the bottle just outside of the door, he was only gone a moment'; I then left the premises."
[27]

II.

The Court erred in not charging the jury as requested by defendant as follows:

"Under the second count of the indictment the defendant Ritter is charged with having on a day specified sold intoxicating liquor containing more than one-half of one per cent of alcohol per volume and fit for use for beverage purposes.

"The defendant Ritter claims that he was entrapped into selling the liquor through the instigation of the prohibition officers, and that the liquor would not have been sold at all if it had not been for the importunities of the prohibition officers who went to his place for the purpose of buying liquor.

"You are instructed that if you believe from the evidence, that defendant was induced by the importunities of the Government agent or agents to violate the law, and that through the instigation of agent Scott or DuBois, or both of them, representing the prohibition department, the defendant Ritter, was induced to sell liquor, and that defendant Ritter would not otherwise have violated the law, then you should return a verdict of not guilty, as it is the policy of the United States Courts not to uphold a conviction in any case where the offense was committed through the instigation of the Government agents."

In connection with this assignment of errors, it will be remembered that no evidence was introduced on behalf of defendant in error which to any degree established justification for the use of a decoy, and, further, the plaintiff in error admitted delivering the liquor and his only defense was the persuasion used by the prohibition officer in inducing him to deliver the liquor; and further that the only reason assigned by the Court for his refusal to give said instruction was that it was not the law in this circuit. [28]

III.

The verdict of the jury as to the second count of the indictment was based upon evidence establishing that the act of defendant in delivering liquor to the prohibition agents was not a voluntary act on the part of plaintiff in error but was induced by the persuasion of the prohibition officer.

IV.

That the alleged crime set forth in the second count in the indictment, as shown by the testimony, originated in the minds of the prohibition agents and the verdict of the jury on said second count of guilty, is against public policy.

V.

That the verdict of the jury on the second count of the indictment is not supported by competent evidence and the same is against public policy.

VI.

The Court erred in overruling and denying the motion of defendant in arrest of judgment.

In connection with this assignment it will be

remembered that plaintiff in error, at the inception of the case of defendant in error and at the time the first witness was sworn, objected to the introduction of any evidence upon the ground that the indictment failed to state facts sufficient to constitute a public offense.

VII.

The Court erred in denying the motion for a new trial.

VIII.

The Court erred in entering the judgment against plaintiff in error upon the verdict in the case.

IX.

The judgment of the Court is contrary to law.
[29]

WHEREFORE said plaintiff in error prays that the judgment of the District Court of the United States, for the District of Nevada, may be reversed and held for naught.

Respectfully submitted,

BOYD & CURLER,

Per JAMES T. BOYD,

Attorneys for Plaintiff in Error.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Assignment of Errors. Filed Feb. 19, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [30]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

**Petition for Writ of Error and for Supersedeas
and Bail.**

To the Honorable E. S. FARRINGTON, Judge of
the District Court of the United States, for the
District of Nevada.

And now comes Henry Ritter, one of the defendants in the above-entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the District of Nevada, entered on the 16th day of December, 1922, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States, for the District of Nevada; that said writ of error may be made a supersedeas, and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said writ of error. Assignment of errors is filed with this petition.

HENRY RITTER,

By JAMES T. BOYD,

His Attorney.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Petition for Writ of Error and for Supersedeas and Bail. Filed Feb. 19, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [31]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Order Allowing Writ of Error and Admitting Defendant to Bail.

That a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States *District for* the District of Nevada, as prayed for in the petition of the said Henry Ritter; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in the cause, it is now ORDERED that the writ of error, allowed as above stated, operate as a supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of

Four Thousand Dollars (\$4000.00), conditioned according to law to be approved by me.

Dated February 19th, 1923.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Order Allowing Writ of Error and Admitting Defendant to Bail. Filed Feb. 19, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [32]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

HENRY RITTER and D. CHURCH,
Defendants.

Bail Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That I, Henry Ritter, of the County of Washoe, State of Nevada, as principal, and S. M. Pickett, of the County of Washoe, State of Nevada, and A. G. Fletcher, of the County of Washoe, State of Nevada, as sureties, are held and firmly bound unto the United States of America, in the full and just

sum of Four Thousand Dollars (\$4,000.00), to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of February, in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS, lately on the 19th day of February, A. D. 1922, at the February Term of the District Court of the United States for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and Henry Ritter and D. Church, defendants, a judgment and sentence was rendered against said Henry Ritter and said Henry Ritter obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid case, and a citation directed to the United States of [33] America, citing and admonishing the United States of America to be and appear in the said court thirty days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such, that if the said Henry Ritter shall prosecute said writ of error to effect, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said Court until

such cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States for the District of Nevada, on such day or days as may be appointed for a retrial by said District Court, and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

HENRY RITTER,

Principal. (Seal)

S. M. PICKETT,

Surety. (Seal)

A. G. FLETCHER,

Surety. (Seal)

Approved as to form and sureties Feb. 21, 1923.

GEORGE SPRINGMEYER,

U. S. Attorney. [34]

State of Nevada,

County of Washoe,—ss.

S. M. Pickett and A. G. Fletcher, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Ne-

vada; and that he is worth the sum of Four Thousand Dollars (\$4,000) over and above all his just debts and liabilities, in property not exempt from execution.

S. M. PICKETT.

A. G. FLETCHER.

Subscribed and sworn to before me this 20th day of February, A. D. 1922.

[Seal]

ANNA M. WARREN,

United States Commissioner for the District of Nevada.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Bail Bond on Writ of Error. The within undertaking is hereby approved. E. S. Farrington, U. S. Dist. Judge. Filed Feb. 23, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter, Reno, Nevada. [35]

In the District Court of the United States, in and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Bond on Writ of Error.

WHEREAS the defendant, Henry Ritter, in the above-entitled action has sued out a writ of error through the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, from a judgment made and entered against him in said above-entitled cause in said United States District Court for the District of Nevada on the 19th day of February, A. D. 1923, or thereabouts; and

WHEREAS, the said defendant, Henry Ritter, by an order of court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred Dollars (\$500.00) to guarantee the payment of all costs in said cause.

NOW, THEREFORE, in consideration of the premises and of the suing out of said writ of error to the said Court of Appeals for the Ninth District of the United States, we, the undersigned, residents of the County of Washoe, State of Nevada, do hereby jointly and severally undertake and promise on the part of the said Henry Ritter that the said person will pay all damages and costs which may be awarded against him on account of the said writ of error or on the dismissal thereof, not exceeding the sum of Five Hundred Dollars (\$500.00) in which amount we acknowledge ourselves jointly and severally bound.

WITNESS our signature this 20th day of February, A. D. 1923.

HENRY RITTER.

S. M. PICKETT.

A. G. FLETCHER.

[36]

State of Nevada,
County of Washoe,—ss.

S. M. Pickett and A. G. Fletcher, each for himself and not one for the other, being first duly sworn, deposes and says: That he is a resident and householder of the County of Washoe, State of Nevada, and is the same identical person who signed the above and foregoing bond and undertaking; and that he is worth the sum of Five Hundred Dollars (\$500.00) over and above all indebtedness and in property subject to execution.

S. M. PICKETT.

A. G. FLETCHER.

Subscribed and sworn to before me this 20th day of February, A. D. 1923.

[Seal]

ANNA M. WARREN,

Notary Public in and for Washoe County, State of Nevada.

My commission expires March 4, 1925.

Approved as to form and sureties Feb. 21, 1923.

GEORGE SPRINGMEYER,

U. S. Attorney.

[Endorsed]: No. 5593. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. Henry

Ritter and D. Church, Defendants. Bond on Writ of Error. The within undertaking is approved Feb. 23, 1923. E. S. Farrington, U. S. Dist. Judge. Filed Feb. 23, 1923. E. O. Patterson, Clerk. Boyd & Curler, Attorneys for Henry Ritter. [37]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Praeipie for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the 9th Circuit, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

Indictment.

Verdict.

Motion for new trial.

Motion in arrest of judgment.

Judgment or sentence.

Petition for writ of error.

Assignment of errors.

Bill of exceptions.

Writ of error.

Order allowing writ of error.

Citation to writ of error.

Supersedeas bond.

Cost bond.

All minutes of court.

BOYD & CURLER,
Attorneys for Defendant.

[Endorsed]: No. 5593. In the District Court of the United States for the District of Nevada. The United States vs. Henry Ritter and D. Church. Praecipe. Filed March 24, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [38]

In the District Court of the United States of America, in and for the District of Nevada.

#5593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Stipulation Re Settling Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED, that the proposed bill of exceptions submitted by the defendant Henry Ritter, and the proposed amendments to bill of exceptions proposed by

the plaintiff, are true and correct, and may be settled by the Court as such.

GEORGE SPRINGMEYER,

United States Attorney.

BOYD & CURLER,

Attorneys for Defendants.

Dated: March 31, 1923.

[Endorsed]: No. 5593. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Stipulation Filed March 31st, 1923. E. O. Patterson, Clerk. [39]

In the District Court of the United States of America, in and for the District of Nevada.

#5593.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Amendments Proposed by Plaintiff to Bill of Exceptions.

After line 18 on page 7 insert the following:

IRA L. SWEARINGEN, called as a witness by plaintiff, testified as follows:

“I am employed with the Heinecke Construction Company. I know Mr. Ritter and I have seen Mr. Church. I was in Bowers Mansion on May

10th, 1922, when Mr. Ritter and Mr. Church were placed under arrest. I went there with Mr. Grier and Mr. Burris, and we asked for a drink. The man in the barroom said they did not have any, and later Mr. Ritter came in and we asked for a drink, and he went out of the place, I don't know where, I think to his own private quarters, and brought back a bottle and gave us a drink each. He did not serve it. He gave it to the man behind the bar who served the drink. Some stranger came in and we all had a drink at the bar, served by the bartender."

On cross-examination the witness testified as follows:

"I don't remember Mr. Ritter being outside or going out to the automobile. I don't remember asking him for a drink. Church said that he did not have anything to drink. Later Mr. Ritter came in. [40] As I remember Mr. Grier and Mr. Burris both asked for something to drink, and Ritter said he did not serve anything there. After some conversation he finally went and got this bottle. He was gone possibly five or ten minutes. I did not see any money on the bar. I know I did not take any money out of my pocket in payment of the drinks, and I did not see anyone behind the bar."

Amend line 6 on page 9 by inserting the following:

"Mr. Church hollered to us from the window when we drove up, and he came out and shook hands with us. I had not seen him for years. He was in Southern Nevada. Mr. Ritter brought down

the bottle and I think stood it on the bar, and then we were served a drink. Mr. Church served the drink. Henry Ritter was talking to me at the end of the bar. I think everybody at the bar, including the other man who served the search-warrant, took a drink.”

Amend line 27 on page 9 by inserting the following:

“I am employed on the Nevada Industrial Commission.”

Amend line 31 on page 26 by inserting the following:

The defendant Ritter, on cross-examination testified as follows:

“On May 12, 1922, when I was indicted, I came here to see the United States Attorney to appear before the Grand Jury, and told him of my own free will what occurred at Bowers Mansion. I do not know positively whether or not Scott and Du Bois paid for the drinks on May 8th. I would not swear either one way or the other. I called upon the United States Attorney voluntarily, and told him that I could not [41] swear whether or not Scott and DuBois gave me the money on the first trip. I went into the Grand Jury. Before going in I was advised that anything I might say might be used against me. I went freely and voluntarily. I said before the Grand Jury that I thought Scott and DuBois paid me a dollar for the two drinks they bought on May 8th, 1922, but I was not sure of it. ‘I am almost sure,’ I said, ‘But I could not swear to it.’ I think they paid me a dollar. That is my best

recollection at this time. I could not swear to it to-day. I do not recall a man and a woman being in the barroom on May 8th. They absolutely were not there. I don't know the woman named Mrs. Veal. Some fellow came up there and wanted to get a divorce from his wife and asked me if his wife was there, and I did not even know at the time that was his wife, but that woman was not in the barroom, or either one, on the 8th. There was not one, single, solitary soul in the barroom besides Scott and DuBois. Veal did not raise a fuss on that occasion. He came and he did not make any fuss at all. He asked me if his wife had been stopping there, that is long afterwards, and I said no, I did not even know his wife, didn't know anything about her, and she wasn't stopping there. I did not sell liquor to any one else. I had another gallon of liquor in addition to these two gallons. I guess I pretty nearly drank it all and I had to go pretty easy at that. If I was drinking any I could drink it in a month. I heard Mr. Carter say there were two empty jugs each of a gallon capacity containing the dregs of liquor, out of doors. I don't know anything about them. I don't think they were there [42] or belonged to me or not. I don't know anything about it, and I don't think there were any there on account of I haven't got any. I didn't see any high school children intoxicated about Bowers Mansion on May 8th or 10th, 1922. I said to Mr. Grier when they asked for a drink of intoxicating liquor that they had enough. They appeared to be somewhat intoxicated at that time. They had all

they needed. They could have got along without it. After Mr. Scott said I was under arrest Grier and the whole bunch stood there and asked Scott if he wanted them for anything and Scott told them no, they could go. When I first was in the barroom on May 10th there was a little money lay between some of the boys there on the counter, ten-cent pieces, nickels, quarters, four or five dollars, something like that. I didn't count it. I imagine there was four or five dollars. Mr. Church did not go behind the bar, I know. I went behind the bar. I brought the bottle down from my room, took it and went behind the bar, and Mr. Church had to move out of my way when I went in. Church was on the end on the outside, and I shoved him out of the way. I went behind the bar, took the glasses and gave Harry and Burris and the other man a glass apiece, and I took one. We all took a drink together and Scott came in and was shaking himself and I took one of the glasses and gave it to him and he poured it full. I gave the men the glasses. I do not know what became of the money while I was upstairs. I put the glasses on the counter, and I took them off the counter, and all took a drink from the bottle I brought from upstairs. I had the jugs in my room between the [43] dresser and the wall in a sack. I also had a funnel I used to fill up the bottles. I got the quart bottle out of my room in the dresser where there was a little cordial and a little Gordon Gin in the bottle, and that bottle of whisky. That is where I kept it for my own use. I didn't tell Scott and DuBois on May 8th that I would square

them with Steve at Franktown, and I did not telephone Steve.” [44]

In the District Court of the United States of America, in and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY RITTER and D. CHURCH,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 15th day of December, 1922, and said trial was concluded on the 16th day of December, 1922, before the Honorable E. S. Farrington, one of the Judges of said court, and a jury empaneled; George Springmeyer, Esq., appeared as counsel for the Government; and M. A. Diskin, Esq., and James T. Boyd, Esq., appeared as counsel for the defendants.

The Government to maintain its case offered the following evidence and in the course of the examination of the witness, THOMAS SCOTT, the following proceedings were had:

Testimony of Thomas Scott, for the Government.

Q. Now, what occurred when you drank this corn whiskey, as you call it?

A. I retained the bottle, which was full with the exception of three or four glasses that had been taken out of it, and I walked over to Mr. Ritter,

(Testimony of Thomas Scott.)

took a warrant from my pocket, handed him a copy of it; he was leaning against the end of the bar, and I informed him I was a Federal agent, and the house was in the custody of the Government, I then stepped to the door where Mr. DuBois was, and requested Mr. DuBois to call the rest of the men; in the meantime I turned to Mr. Burris, Mr. Grier and the other gentleman and I told them, gentlemen, you are at liberty to leave if you wish, but if you wait until the rest of the boys come I don't know what action they will take; so they left. Agent Nash came along first, the other three agents following him; I handed the bottle to Mr. Nash, also the original search-warrant, and informed Mr. Nash that Mr. Church had sold the drinks. [45]

Mr. DISKIN.—We object.

Mr. SPRINGMEYER.—(Q.) Was this in the presence of Mr. Church and Mr. Ritter?

A. They were in the same room.

Q. Did they hear?

A. They could not very well not have heard it.

Q. What language did you use?

Mr. BOYD.—We object to what language he used. You can't define the crime by the language used by this witness after the commission of the offense, it is merely descriptive of what has transpired.

THE COURT.—Have you any authority that a statement made in the presence of the defendants is inadmissible for that reason?

Mr. BOYD.—No, sir, it is a general proposition.

THE COURT.—I know of no authority. A

(Testimony of Thomas Scott.)

statement made with reference to the commission of an offense in the presence of the defendant has always been admissible in this court. If there is a rule to the contrary I would like to see it.

Mr. BOYD.—I haven't those at my finger tips, but we make the objection just the same.

THE COURT.—You should always anticipate the Court is ignorant on matters of that kind, and needs instructions. The objection will be overruled.

Mr. BOYD.—Exception.

Mr. SPRINGMEYER.—(Q.) Please answer the question.

A. When Mr. Nash came to the door I handed him the bottle and warrant, with the remark, "Here is the bottle and the warrant, Mr. Church served the liquor, Mr. Ritter got the bottle just outside of the door, he was only gone a moment"; I then left the premises.

And the plaintiff in error now assigns his exception to the ruling of the Court overruling defendant's objection to the question propounded, as stated above, and to which an exception was duly entered.

That counsel for the defendant before the jury retired requested the Court to charge the jury as follows, and that in reference to said charge the following proceedings were had:

"Mr. DISKIN.—If your Honor please, we would request the Court at this time to give to the jury the instruction presented to the Court by the defendants for the use of a decoy. That instruction

was taken from the case of United States vs. Peterson.

THE COURT.—Yes, I understand that, and I cannot follow it. It simply means this, if I understand that instruction: If a Federal official goes into a soft-drink place, asks for a drink of whiskey and gets it, the man who sells it is not guilty. I cannot understand it any other way; and this is not the [46] decision in the Circuit Court of Appeals in this district by later authorities.

Mr. DISKIN.—May we have an exception to the Court's refusal to give it?

THE COURT.—You may have an exception. Is there anything else?

Mr. DISKIN.—That is all.

THE COURT.—I simply say this: I cannot bring my mind to the conclusion that the Circuit Court of Appeals for this circuit, or any other court, will uphold the doctrine I have announced, that if a Federal official, or any other official, goes into a soft-drink place and asks for a drink of whiskey, that the person who sells the whiskey cannot be convicted; and I cannot understand that instruction any other way."

And that the instruction so requested by defendant to be given to the jury by the Court and which the Court refused to give to the jury, reads as follows:

“ ‘Under the second count of the indictment the defendant Ritter is charged with having on a day specified sold intoxicating liquor contain-

ing more than one-half of one per cent, of alcohol per volume and fit for use for beverage purposes.

‘The defendant Ritter claims that he was entrapped into selling the liquor through the instigation of the prohibition officers, and that the liquor would not have been sold at all, if it had not been for the importunities of the Prohibition officers who went to his place for the purpose of buying liquor.

You are instructed that if you believe from the evidence, that defendant was induced by the importunities of the Government agent or agents to violate the law, and that through the instigation of agent Scott or DuBois, or both of them, representing the prohibition department, the defendant Ritter, was induced to sell the liquor, and that defendant Ritter would not otherwise have violated the law, then you should return a verdict of not guilty, as it is the policy of the United States Courts not to uphold a conviction in any case where the offense was committed through the instigation of the Government agents.’ ”

And the defendant also then and there, and before the jury retired, excepted to the ruling of the Court in failing to charge the jury as above requested by the defendant. Whereupon the jury retired and brought in a verdict finding the defendant guilty as charged in the indictment. And that thereafter the defendant, and within ten days from

(Testimony of Thomas Scott.)

the date of trial of this case, duly presented [47] and filed with the clerk of this court his bill of exception to the Court's refusal to give the afore-said instruction.

AND BE IT FURTHER REMEMBERED that THOMAS SCOTT, a witness produced on behalf of the Government, after being first duly sworn, testified as follows: That since the 20th day of February, 1922, he has been and now is a federal prohibition agent; that he has known defendant Ritter four or five years; that during the month of May, and on the 8th day of May, 1922, in company with Agent DuBois of the prohibition force, and at the hour of 3:35 P. M. on said day, he visited the premises described as Bowers Mansion; that Bowers Mansion was a summer resort where soft drinks and lunches were served, and that in connection with the said place there was a barroom consisting of a bar, a table, and a couple of chairs; that there was a lot of glasses and bottles back of the bar; that on the day in question Scott entered the premises the defendant Ritter came forward to meet him; Scott said to Ritter, "How do you do, Mr Ritter?" and Ritter replied, "How do you do?" Scott then said, "It is a pretty cold day, that wind is blowing," and Ritter replied, "Yes, it is pretty cold. Which way are you headed?" Scott replied that he was headed toward Carson; Scott further said to Ritter, "What is the chance of getting a little shot?" and Ritter says, "All right." Ritter went behind the bar and got a quart bottle about half full of liquid, put the

(Testimony of Thomas Scott.)

bottle and the glass on the bar; Scott filled the glass about half full and drank it and Scott paid him, Ritter, one-half a dollar for it. DuBois was called to the place by Scott; after DuBois obtained some oil for his car he came back to the barroom and called for a shot. Ritter put the bottle up in front of both Scott and DuBois and each took a glass of liquor. DuBois paid \$1.00 for it. Scott then tried to [48] buy a bottle and Ritter informed Scott that all he had on the place was in the bottle and he wanted to keep that for the boys. Scott and DuBois then left the place and returned again at 4:20 P. M. at which time Mr. DuBois bought two drinks of corn whiskey, one for himself and one for Scott. DuBois saved some liquor by putting it into a small bottle. There were then a man and woman standing at the south end of the bar, each with a small whiskey glass containing some brown liquid. The money that was paid for the drinks was put into the cash register. Scott and DuBois returned again to the premises on the 10th day of May that same year at 3:40 P. M. and three people, Mr. Grier, Mr. Burris and another were walking toward the bar on this occasion; all five went to the bar together; that Mr. Ritter went behind the bar, got an empty quart bottle, and left the barroom and returned in about three minutes, and handed the bottle to defendant Church, who pulled the cork, and put glasses on the bar; then the bottle was passed to the men standing in front of the bar and when it came to Scott he drank a little of the liquor to make sure

(Testimony of Thomas Scott.)

what it was, then seized the bottle, and that the bottle contained corn whiskey. Scott further testified that he then called in the other officers and arrested defendants, and on the occasion of his visit on the 10th day of May there was money on the bar in front of one of the men standing before the bar—the amount of which was \$2.50. That in the presence of the defendants he informed officer Nash that Church had sold the drinks and that Ritter got the bottle just outside the door.

On cross-examination Scott testified that on May 8, 1922, he said to defendant Ritter, "How do you do, Mr. Ritter?" and that Ritter shook hands saying something about [49] the weather being cold and the wind blowing. That Scott gave no excuse for asking for a drink. That when he asked for a drink, Ritter went behind the bar and got the bottle about a minute after Scott entered. That Scott and DuBois had no trouble at all in getting either the first or the second drink on May 8th. The second time DuBois walked in and said, "Give me another drink," and Ritter placed the bottle and the glasses on the bar. The same man and the same woman as on the first occasion were then in the bar-room, standing at the south end of the bar.

On May 10th, 1922, first saw Grier and Burris and another man walking toward the bar. Defendant Ritter was at the end of the bar, and defendant Church back of the bar. Then Ritter took an empty bottle, left the barroom by the door on the south side and returned in two or three minutes with a full

(Testimony of Thomas Scott.)

bottle. Ritter handed the bottle to Church, who pulled the cork and set the bottle before the first man at the bar. The money was still on the bar when Scott walked out, after the drinks were served. Scott tasted the liquor before seizing the bottle.

Testimony of Mr. DuBois, for the Government.

Mr. DUBOIS testified that on the 8th day of May, at 3:35 P. M. after he purchased some oil for his car, that he and Scott went into the barroom and bought from Ritter a drink of liquor; that it was whisky; that he gave Ritter \$1.35 in payment of two drinks of liquor, a pint of oil and a cigar; that a man and a woman were in the barroom at the time; Scott and DuBois returned at 4:20 P. M. on the same day. The man and woman were then standing at the south end of the bar, drinking from whisky glasses something that looked like liquor. Scott and DuBois ordered drinks which were served by defendant Ritter from a quart bottle which he took from behind the bar. DuBois paid a dollar for the [50] two drinks which defendant Ritter placed in the cash-register. DuBois saved his drink. On May 10th, DuBois, in company with Scott again visited the premises. Scott went indoors and came out holding a quart bottle in his hand and telling DuBois to call the rest of the bunch. DuBois saw the defendants and three or four others, whom he did not know, before the bar, on which there were glasses. The place is a soft-drink establishment.

(Testimony of Mr. DuBois.)

On cross-examination, DuBois said that after he left the premises on each occasion he made notes of what had occurred, and that Scott did likewise. Scott and he on May 8th got oil for the car at a little garage at Bowers. Then they went inside where DuBois bought a round of corn whisky from defendant Ritter, who was back of the bar. A man and a woman were present at the time. Defendant Ritter would not sell a bottle because he said he did not have it to spare, but he said he would "Square them at Steve's," about a mile down the road. DuBois and Scott returned in about three-quarters of an hour.

Testimony of Harry Grier, for the Government.

HARRY GRIER, called as a witness by the plaintiff, testified that he was acquainted with Mr. Ritter and Mr. Church that he was present at Bowers Mansion on the 10th of May, 1922. That he was on his way to Reno in the afternoon of that day with Mr. Burris and Mr. Swearingen and they stopped at Bowers Mansion and saw Mr. Church looking out of the side window. Mr. Burris spoke to Church but he, the witness, did not recognize Church at first. Church came out and shook hands and the party returned into the saloon and somebody asked if there was anything to drink and Church said "Yes, soft drinks," and they asked if there was anything else and he said, "No." One of the party asked where Henry was and Church said he was upstairs and Burris went after [51] Henry, and Henry

(Testimony of Harry Grier.)

came down with a bottle of whisky, "and I was standing at the end of the bar talking to Henry; he was at the end of the bar like this (illustrating), and I was standing here, when this man, I didn't know who he was, and wouldn't know him now, I don't believe, said, well, I think he said, 'You are under arrest,' or something, 'I will take that,' and he took the bottle, and then he came over and he served on me a paper, and I opened it, and it was a search-warrant, and I just—he served it on me and I opened it and glanced at it, and saw it was made to Henry Ritter, and I said to Henry, 'I guess this belongs to you,' and I handed it to him, and then I think Steve said, 'Let's go; this is no place for us,' or something of that sort, and we left there and came around and got in my car, and I started the engine, and we were just coming around back of the house out of the driveway when an automobile came around with Nash and Brown, and I don't know, there may have been one or two others in there. That is all I know about it." Mr. Church served us with the drink, Ritter was at the end of the bar talking to me. Henry Ritter was at the bar, I stood next to him, Mr. Burris next to him and Steve next to Burris and then this other man I don't know who he was, he was the man who served the warrant. The whisky was in quart bottles, Mr. Ritter brought it in his hand when Mr. Burris asked for it. We drank the whisky out of whisky glasses

(Testimony of Harry Grier.)

On cross-examination the witness testified that Mr. Ritter was not there when they first went in. Someone asked Mr. Church for a drink and he was informed that they had nothing but soft drinks. "When we first went in and asked for Ritter, Mr. Church informed us he was upstairs, and Mr. Burris went out and came back with Mr. Ritter. [52] "Ritter had a bottle and set it on the bar. There was just Mr. Burris, Steve, Henry Ritter and Mr. Church and Swearingen in the bar and the other man (an officer) was not invited to have a drink but I am not positive of that." Everybody took a drink. "I did not buy a drink and did not go in there for the purpose of buying a drink."

Testimony of R. P. Burris, for the Government.

R. P. BURRIS, a witness called on behalf of the plaintiff, testified that he lived in Carson and was employed on the Highway Commission, that he knew Mr. Ritter and Mr. Church and was present at Bowers Mansion on the afternoon of May 10th, 1922, when Federal Officers placed defendant under arrest for violation of the Prohibition Law. "Well, we went in and asked the bartender for a drink, and the bartender said he didn't have anything, they served nothing but soft drinks there, so we asked for Mr. Ritter, and he went to Mr. Ritter's room, and he came down, and we persuaded him to give us a drink, and he said they didn't have anything but soft drinks, but he would go to his room, and he came down with a bottle, and we had a

(Testimony of R. P. Burris.)

drink." "I don't know whether it was a quart bottle or not and contained the liquor, it was a large bottle." Mr. Grier, Mr. Swearingen and myself and some stranger was there at the time and we all had a drink, "at least I think so." "We had one drink." "Then a warrant was handed to Mr. Grier and he said it wasn't for him, and he handed it to Mr. Ritter and just then we all beat it."

On cross-examination the witness testified that he had known Mr. Ritter off and on for six or seven years and had been friendly with him. "When we first went into the barroom Mr. Ritter was not there. The bartender told us that he did not have anything and he said Mr. Ritter [53] was in his room and we asked him to go to the room for him. "Mr. Church went to the room for him, I did not go after Ritter. Ritter came down first empty handed and after he found out what we wanted he went back after the bottle." Mr. Grier had a conversation with Mr. Ritter when he first came down. Mr. Grier told Mr. Ritter he wanted a drink. After Grier told Ritter that Ritter went upstairs somewhere and got a bottle. "I did not see any money change hands." "I did not see the stranger that was there until he came up from behind the stove. He was not in the balance when we first went in. I think he was there when Mr. Ritter first came down and remained there until after Mr. Ritter came in the second time. I did not see any money on the bar nor did I see anyone offer to pay for the drink."

(Testimony of R. P. Burris.)

On redirect examination witness testified that he did not know whether any money was passed or not; everyone was pretty well excited when they found the raid was in progress. "I know that I did not pay any money there."

Testimony of A. Carter, for the Government.

A. CARTER, being sworn as witness for the plaintiff, testified he knew Mr. Ritter and Mr. Church the defendants. Knows Bowers Mansion. "It is a sort of soft-drink establishment and a resort." Been there on several occasions. Was there early in May and saw soft-drinks; saw people there.

Q. How were they, drunk or sober when you saw them?

Mr. DISKIN.—That is objected to.

Mr. BOYD.—We object to that as incompetent, irrelevant and immaterial.

Mr. SPRINGMEYER.—(Q.) On the 10th day of May have you seen people there who were drunk or sober?

Mr. BOYD.—We make the same objection, that it is incompetent, irrelevant and immaterial. [54]

Mr. SPRINGMEYER.—I don't think that is incompetent, irrelevant, or immaterial.

The COURT.—You allege possession of intoxicating liquor on the 8th and 10th?

Mr. SPRINGMEYER.—Yes.

The COURT.—I will allow the question.

Mr. BOYD.—We take an exception.

(Testimony of A. Carter.)

Mr. SPRINGMEYER.—(Q.) How about it, Mr. Carter? A. I have seen them both ways.

The COURT.—I think there are two days.

WITNESS.—On one occasion.

The COURT.—May 8th or 10th.

WITNESS.—On the 10th.

Witness was present when Mr. Ritter and Mr. Church were placed under arrest.

“I accompanied the rest of the officers out there on the raid; when we were called inside by agent Scott they already had been placed under arrest; I helped search the hallway and the outbuildings, was my particular job.” “In the place, the outbuilding directly behind the bar, I found two jugs that had contained alcoholic liquor.” That they were gallon jugs. “I did not see any liquor in the barroom that day only what had been seized and Mr. Brown had some bottles.” Mr. Nash had the liquor when the witness first saw it—it was a quart bottle, he the witness did not go into the bar.

On cross-examination the witness testified that he did not visit the premises on the 8th of May but visited them on the 10th of May. “I don’t know the parties I saw intoxicated there that day. They were outside of the barroom. I don’t know where they got their liquor.” “I don’t want the jury to infer from my testimony that they got the liquor at Ritter’s place.” [55]

“I did not see them buy any liquor, all I know is that I saw people that were intoxicated.”

(Testimony of A. Carter.)

Q. Were they staggering?

A. They were walking.

Q. Walking? A. Yes, sir.

Q. What time of day was it?

A. It was in the afternoon when we were there.

Q. How soon after the arrest was it?

A. Why, oh just a few minutes, I could not state the exact time.

Q. They were walking you say? A. Yes, sir.

Q. Well, what gave you the impression or led you to the conclusion that they were intoxicated?

A. From their appearance.

Q. What about their appearance?

A. Well, they wasn't walking very straight, walking in a slow manner.

"These people might have been Mr. Grier and Mr. Burris, I did not know them. I saw them right after the arrest." "I don't know how they left the place." "I did not see them come out of the barroom and I am not positive where they came from—they might have been walking around there for an hour or more."

Testimony of H. P. Brown, for the Government.

H. P. BROWN, called as a witness for the plaintiff testified:

Q. Mr. Brown, you are now and have been for several years Federal prohibition agent for the State of Nevada? A. Yes, sir.

Q. Were you present on May 10th, 1922, in the

(Testimony of H. P. Brown.)

afternoon at Bowers Mansion when the defendants Ritter and Church were placed under arrest?

A. Yes, sir.

Q. Just tell the Court and jury what you saw and heard and did.

A. Mr. Nash and I entered the soft drink part of Bowers Mansion; Mr. Scott, agent Scott, was there, and he told Mr. Nash and I— [56]

Mr. DISKIN.—Just a moment. He told who?

A. He told Mr. Nash and I.

Mr. DISKIN.—I object to that as hearsay.

Mr. SPRINGMEYER.—Unless it was in the presence of the defendants, or either of them.

A. It was.

Q. Did they hear it? A. I don't know.

Q. How far away were they?

A. Oh, probably three or four steps.

Q. Then state, please, what Mr. Scott said.

A. Mr. Scott says, "Here is the bottle," he says, "The bartender served the drinks, and Ritter went out to get them, to fill the bottle."

Q. What sort of a bottle was it that Mr. Scott showed you? A. A quart bottle.

"Mr. Ritter and I went upstairs and I asked him to show me where his room was, and he did so."

Mr. SPRINGMEYER.—(Q.) What did you find in the premises, Mr. Brown, if anything?

A. I asked Mr. Ritter to show me his room, and he took me up and showed me a room where no one was living, and I told him I wanted to see his room, and he took me over to his room, and right behind

(Testimony of H. P. Brown.)

the door there was a sack containing two gallons of liquor and a funnel, a brass or copper funnel.

Q. Will you please examine these two bottles and state whether they are the bottles or containers you found in that room?

A. Yes, sir; those are the two; the funnel, we are unable to find the funnel.

Q. You say there was a funnel?

A. A copper funnel, yes, sir.

Q. And what else?

A. Those things were in a barley sack.

Q. What was done with these bottles? [57]

A. Mr. Nash took charge of them; I think we left Mr. O'Neil with the evidence, to watch the evidence while we went on another errand.

On cross-examination the witness testified:

Mr. BOYD.—(Q.) Mr. Brown, who served the search-warrant? A. I don't know.

Q. How did you know a search-warrant was served?

A. I didn't know one was served; I knew there was one out, and I knew that they had it on the way down.

Q. Then you were mistaken when you answered Mr. Springmeyer that you knew a search-warrant had been served, weren't you?

A. I didn't see it served; I knew we had a search-warrant for the place.

Q. That is not my question. You were mistaken when you told Mr. Springmeyer that you knew a search-warrant had been served?

(Testimony of H. P. Brown.)

A. Yes, sir, if I said that I am mistaken.

Q. You didn't see a search-warrant at all?

A. No, sir; I did not.

Further testified that nobody called him into the place, he walked in through the door. Mr. Nash and Mr. O'Neil were with him. That he was in the car with Mr. Nash, Mr. O'Neil and Mr. Carter. That they stopped outside the gate and waited for orders from Mr. Scott when to come in. They waited probably three or four minutes. "Mr. Nash told me that Mr. Scott had told us to come in. I went from the car around to the south door and went into the barroom. While I was going around the south-side I saw Mr. Grier and Bubbles. I didn't meet anyone else when I got into the building I saw Mr. Scott and Mr. Ritter. Bubbles and Harry Grier were in the car outside the building. [58] When I went in there I saw Mr. Scott, Mr. Ritter and Mr. Church. Mr. Church was behind the bar I can't say exactly where, Mr. Ritter was standing. Mr. Scott was at the door. Scott had a bottle of liquor in his hand. Mr. Nash was also inside. He went in one door and I went in the other. He got in there about the same time I did I guess."

On redirect examination the witness testified: "When I went in there I saw some glasses and two dollars and a half in silver on top of the bar."

Recross-examination.

"Mr. BOYD.—(Q.) Why didn't you state that the first time I asked you what you saw there, Mr. Brown?

(Testimony of H. P. Brown.)

A. I thought you meant in regards to people.

Q. I asked you what you saw in there the first time, and then I asked you about the people. You saw two dollars on the bar? A. No, sir.

Q. How much did you see?

A. Two dollars and a half.

Q. Two and a half? A. Yes, sir.

Q. You didn't put that there, did you?

A. No, sir.

Q. Did you see anybody put it there?

A. No, sir.

Testimony of P. Nash, for the Government.

P. NASH, called as a witness for the plaintiff, testified: That he was one of the Federal Prohibition Agents of the State of Nevada that he was present on the afternoon of May 10th, 1922, at Bowers Mansion in Washoe County, Nevada, when the defendants Ritter and Church were placed under arrest.

Please state just what you saw and heard.

A. Do you want the entire occurrence from the time we came down the road ?

Q. Yes, in chronological order, as near as may be.

A. We were in our car at a point about, possibly a hundred [59] yards from the gate, the entrance to Bowers Mansion property, and saw Mr. DuBois come out to the entrance, to this gate, and give me the high sign, this was a signal that had already been agreed upon; we then drove up to the side door, got out, went into the barroom, and met Mr. Grier just outside the door on the porch; went into

(Testimony of P. Nash.)

the barroom, found Mr. Scott there with Mr. Ritter and Mr. Church; I didn't know Mr. Church, I knew Mr. Ritter; and Mr. Scott told me that Mr. Church sold the drinks and Mr. Ritter—

Mr. BOYD.—Wait a minute. Was that in the presence of Ritter and Church, and within their hearing? A. It was.

Mr. BOYD.—We want to make the objection that it is immaterial, irrelevant and incompetent, and hearsay, and have it understood this objection will apply to this class of testimony.

Mr. SPRINGMEYER.—Yes, that is all right.

WITNESS.—There is a reason for this statement, I can explain it.

Mr. BOYD.—Never mind the reason, give the answer.

Mr. SPRINGMEYER.—(Q.) Please give the statement, Mr. Nash.

A. The statement is that Mr. Church sold the drinks and Mr. Ritter brought in the bottle.

Mr. SPRINGMEYER.—(Q.) Go on and describe what you saw and heard and did?

A. Mr. Scott when he left handed me the warrant, the original of the warrant, so as to be sure to have our authority with us.

Q. Yes.

A. And Mr. Brown took Mr. Ritter, and went to a back room or somewhere, I don't know; I went down in the cellar, and searched behind the bar, and found soft drinks there.

(Testimony of P. Nash.)

Q. Before Mr. Brown took Mr. Ritter do you know whether or not the search-warrant had been served? [60]

A. It had been served; Mr. Ritter already had a copy of it, and I exhibited to him the original that I had.

Q. And what was done with this bottle which you say Mr. Scott had?

A. I took it in my possession immediately.

Q. Did you see anything on the bar?

A. Yes; I saw the whiskey glasses and I saw money.

Q. What money did you see on the bar?

A. Two and a half.

Mr. SPRINGMEYER.—(Q.) How many men were in the barroom when you entered, Mr. Nash?

A. When I entered?

Q. Yes.

A. Mr. Scott, Mr. Ritter and Mr. Church were all in there when I entered; I met Mr. Grier on the porch, coming out.

Q. Just coming out of the room? A. Yes.

Q. And the other two men, Burris and Swearingen?

A. They were in the car, I think, or getting into the car; there was a car there, they drove off in it, and at the time they drove off I didn't pay any more attention to them.

Q. Where were Church, Ritter and Scott standing?

(Testimony of P. Nash.)

A. When I came in Mr. Church was behind the bar, about the center; Mr. Ritter was at the south end, and Mr. Scott was standing in front of the bar.

On cross-examination the witness testified:

“I saw some whiskey glasses and I saw some money and I saw some soft-drink bottles. I guess that is about all there might have been a stove there.” “Mr. Scott was standing in front of the bar, Mr. Ritter at the end of the bar, the south end, Mr. Church behind the bar.”

Q. Who served the warrant?

A. Mr. Scott gave me the original, and I, if you call it serve, showed it to Mr. Ritter again, I presume he had had it once before, but to make sure.
[61]

Q. I didn't ask your presumption; I asked who served the search-warrant.

Mr. SPRINGMEYER.—If you know.

A. I know that I served what was given to me, if you call it service; I showed it to him, he already had a copy in his hand.

Mr. BOYD.—(Q.) You didn't give him a copy?

A. No, sir.

Witness further testified:

Q. Where was Mr. Church?

A. Mr. Church was behind the bar.

Q. What end of the bar?

A. He was in the middle of the bar.

Q. Right in the middle of it, and these glasses were on the bar there? A. They were.

Q. And two and a half in money? A. Yes.

(Testimony of P. Nash.)

Q. Did you count it? A. I did not.

Q. How do you know it was two and a half?

A. Because it was two and a half.

Q. How do you know it?

A. Well, there are some things a person knows.

Q. How do you know it if you didn't count it?

A. Two dollars and a half dollar make two and a half.

Q. If you counted it you saw two one dollars and fifty cent piece, didn't you?

A. Yes, I saw two dollars and a fifty cent piece.

Q. Where was it? A. On the bar.

Q. Middle of the bar or on the end?

A. Somewhere about,—I would not care to testify as to the exact position of the money, to tell the truth; I think it was close to Mr. Church, but I don't know for sure.

Q. Wasn't it at the south end near Mr. Ritter?

A. I don't know, it was on the bar, that is all I do know.

Q. Was it the middle of the bar? [62]

A. I don't know, it might have been toward the south end, and might have been exactly in the middle.

Q. And that is the best you can say, is it?

A. It is.

Mr. BOYD.—All right. That is all.

Mr. SPRINGMEYER.—That is all, Mr. Nash.
The Government rests.

Testimony of D. Church, for Defendants.

D. CHURCH, one of the defendants, called on behalf of the defendants, testified as follows: That his name is Deisn Churich, was born in 1855, worked in the shops in Sparks for three years and quit a year ago. First met his codefendant Mr. Ritter in 1884. That he was not at Bowers Mansion on the 8th day of May, 1922, but went there on the 9th. He went to work at Bowers Mansion the last Sunday in May. Did general work around the bar and everything of that kind. He was at Bowers Mansion on the 10th day of May, 1922. "I knew Mr. Grier and Mr. Burris, saw them at Bowers Mansion on the 10th day of May. I had received bad news from my home."

He further testified:

Q. Now just go right along and tell the jury what took place?

A. I was in the saloon and Mr. Grier come in their automobile on the side, on the side window, come in automobile, and stop right in front of window of the saloon, on the north side; I was at the window there, and I just raised my hand, and they come in.

Q. Was Mr. Ritter there at the time?

A. No, no, I don't think so.

Q. How? A. I was the only one in the bar-room.

Q. You were the only one in the barroom?

A. I was the only one in the barroom, so he came

(Testimony of D. Church.)

in and ask me, "How is everything?" I say, "Everything is all right"; he say, "You got anything to drink?" I say, "No, nothing there but soft drinks, that is all, he don't keep liquor here at all." [63] "You know us," he say, "and we all right," he say. "If you got it, give it to us"; I say, "No, I ain't got it."

Q. Who carried on the conversation with you?

A. Mr. Grier.

Q. Mr. Grier?

A. Yes, I say, "No," I say, "I got nothing but soda, or something like that; that is all"; I say, "I ain't work here either, I am just here stopping here, that is all." "Where is Mr. Ritter?" I say, "I don't know; he is out somewhere. He ain't around here."

Q. Proceed, and go a little slower, please.

A. They went out.

Q. Who went out?

A. Mr. Grier, they went out and look around I think for Mr. Ritter; so after while Mr. Ritter come in, and they come in, they was talking there, one thing and another, and they ask him about the drinks, you know; Mr. Ritter tell him, he say, he don't have nothing; then after while he went out again.

Q. Who went out?

A. Mr. Ritter; I was standing outside the bar there, just leaning on the bar, you know how it is, I felt bad, and I didn't care what is going on; so they come in and stand at the bar there.

(Testimony of D. Church.)

Q. Who came in?

A. These three men, was standing in front of the bar and talking, talking about Goldfield, you know.

Q. You knew them down in Goldfield?

A. Oh, yes, fifteen or sixteen years ago; and that time Mr. Ritter come.

Q. Then Mr. Ritter came in?

A. And another man, Scott; he come in the door, and he was talking there, and honest, I didn't look around, I didn't notice him at all.

Q. Did you see Mr. Ritter have anything in his hand when he came in? A. No, sir, I didn't.

[64]

Q. You saw a bottle, didn't you?

A. I saw a bottle pass each other, pass until it came to Scott the last time; I was standing next to Scott; he turn around and say, "You want a drink?"

Q. Who did he say do you want a drink to?

A. Ask Scott; he say, "You want a drink?" he say, "Yes," and he take a drink, and he says, "I keep the bottle," I notice that time the bottle, you know.

Q. Did Mr. Ritter hand the bottle to you that morning when he came in?

A. No, sir, I never touch the bottle; I look down this way (showing), I feel bad.

Q. You heard the testimony, I think by one of the officers, that Mr. Ritter handed the bottle to you, and you took the cork out of the bottle?

A. Scott say that; I never touch it.

(Testimony of D. Church.)

Q. Did you have a drink?

A. No, sir, I never drink.

Q. Did Mr. Ritter offer you a drink?

A. Well, but I never drink.

Q. Well, he offered you a drink, didn't he?

A. Well, he say, "Have a drink," but I don't drink, I never do drink.

Q. Don't you take liquor at all?

A. No, sir, I never drink; I felt bad, you know, and he thought I take a drink, I better, you know.

Q. You had nothing to do that day with that liquor?

A. Nothing in the world. I was standing in front of the bar when they come in, you know, and I step one side, you know, end ways of the bar, just leaning this way (illustrating) on the bar, you know how I have feeling.

Q. You saw Mr. Ritter, Mr. Grier, Mr. Burris and the other two gentlemen have a drink that time, didn't you, Mr. Church?

A. Why, I didn't see them on the start; I see them when he got the bottle in his hand and say he going to keep the bottle; at that time I look and see what happen. [65]

On cross-examination the witness Church testified: "I was born in Austria, and I was in Serbia." That he has been a naturalized citizen for forty-three years. "I was not in charge of the barroom on the 10th of May when Mr. Ritter was out. I was just in the saloon, that is all. I walked along

(Testimony of D. Church.)

the bar, behind the bar and stand there. I didn't give any glasses to the men."

Q. Did you give the glasses to the men in front of the bar?

A. No, sir, I didn't touch the glass.

Q. How did they get the glasses?

A. I don't know; I didn't give them no bottle or glasses, or nothing there behind the bar at all.

Q. Did you see Mr. Ritter get the bottle?

A. No, sir.

Q. You did tell them that you had soft drinks there? A. I told them I had soft drinks.

Q. You were standing back of the bar then, were you not? A. No, I was outside.

Q. You were outside? A. Outside.

Q. Did you tell them to see Mr. Ritter?

A. I says, "See Mr. Ritter, I don't know nothing about it; I just come in here."

Q. Then did you step back of the bar?

A. No, just went end of the bar that way.

Q. Just the end of the bar? A. Yes.

Q. And you didn't go back of the bar at all?

A. Afterward I went about three feet back of the bar.

Q. Isn't it a fact that you went back of the bar, and that you got the glasses from back of the bar, and put the glasses in front of each of the men standing in front of the bar; is not that true?

A. No, sir.

Further testified:

"I did not see any money on the bar." [66]

Testimony of Henry Ritter, for Defendants.

The defendant RITTER testified that on the 8th day of May, 1922, Agents Scott and DuBois entered that portion of Bowers Mansion occupied as a barroom. They came in together and they were shaking and shivering. DuBois didn't say very much but Scott said: "Give us a drink." I says, "I haven't got anything, I am not selling booze here." "Oh, he says, "come on, it is awful cold," and just shaking and shaking, so I says, "There is nothing doing," so he kept at it and kept at it. He kept asking me to give him liquor, and was shaking and shivering and carrying on, you know; DuBois didn't do much of that, but Scott was pretty strong at it; so finally DuBois was feeling pretty bad, too. I says, "I haven't got any"; pretty soon Scott says, "Damn it, you knew me when I was constable in Sparks, I vouch for my friend, you need not be afraid of us"; I says, "I don't care, I am not selling any booze, and I haven't got any." Pretty soon he says, "Haven't you got a bottle of your own, private?" and then they was shivering and shaking all around, and they kept begging and begging, it was awful cold that day, it was snowing and blowing, and every little while it started to blow and snow, and I kind of feel sorry, and I says, "Damn it," so I went up and got my bottle.

Q. Where did you get your bottle?

A. I went up to my room, upstairs.

Q. Did you have any back of the bar at that time?

(Testimony of Henry Ritter.)

A. No, sir, I never had; I went up and got a bottle and brought it down, and there was about that much in the bottle (showing); so they took a drink, then they want to buy some; he said, "That is damn good stuff," Scott said, he says, "Sell me a little of that." I says, "No," I says, "I haven't got any bottle"; he says, "Take that soda bottle or beer bottle, or anything"; so I picked the bottle up and went upstairs again with it, and I went out the front, and they left. [67]

Q. Now, Mr. Ritter, when Mr. Scott and Mr. DuBois came into your place on this first visit who was in the barroom? A. Nobody but myself.

Q. You heard the testimony that there was a man and a woman there? A. Yes.

Q. Was there a man and a woman there on that occasion? A. No, sir.

Q. There was no one but you and Scott?

A. I was all alone in the barroom when they come in there. I just walk through the center of the house, went to the barroom, and then they come in; there wasn't a soul there that day on account it was cold; I don't know if anyone outside of Scott and DuBois came all day long.

Q. How much time elapsed did you say from the time Scott and DuBois came into your place until you gave them this drink?

A. It was at least from twenty minutes to a half an hour, at least.

Q. During all this time was Scott directing to

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(Testimony of Henry Ritter.)

you this conversation and the request for the purpose of liquor? A. He did.

Q. Do you know whether or not after you had given them liquor, you received any money for it?

A. I could not positively swear to it; I had an idea they first wanted to pay for it, I don't know for sure, I could not swear to it, and I would not, but I didn't, I never sold any; I walked out with the bottle and took it back upstairs, and they left.

DuBois did not purchase any oil or a cigar. Scott and DuBois returned in about three-quarters of an hour and commenced again to ask for drinks and said, "Give us another drink, give us another little drink"; "so I went upstairs and got a bottle and gave them a drink, and then they [68] wanted to buy a bottle, and I says no, and it made me kind of sore the way I refused before and they begging again, so I just took the bottle and started out and they turned around and walked out—all three together. They did not pay for that drink." There was nobody in the barroom on the occasion of the second visit that day.

Ritter further testified that on the 10th day of May, that he had been in Franktown, that he came home walked through the house and heard someone talking and met Mr. Grier and Burris and the Heinicke man and said he knew them all, and they talked together a few minutes and shook hands and Grier said, "Haven't you got anything?" and Ritter said, "No, I don't think you need anything from the looks of you." Then Burris and Grier said,

(Testimony of Henry Ritter.)

"Oh, go on and give us a drink," and Ritter said, "Wait a minute and I will go and get one. I went to my room and got a bottle." "Before I went out I was standing at the end of the counter, and Church was at the end of the counter, and he moved back." I saw a little money lying on the counter, four or five dollars, dimes, nickels and quarters." "Heinicke's man and Burris were there at the counter and I shoved the money back—it was there between the men. I didn't know who it belonged to, I didn't even know if it belonged to them or not. I said "Nothing doing," and then Harry says, "Well, give us a shot." I says, "I need one anyway," so I went upstairs and got a bottle and treat the boys."

"When I first went into the barroom with the bottle I went behind the bar, and I took the glasses and give the boys a glass apiece, and I took one myself; we drank ours, and I took the glasses and set them on the sink on the drainboard; Then Scott, we was all through drinking when Scott came in; Scott came in and stepped up against the end of the bar there and said, 'Whoo,' so I took a glass, shoved it over to him and [69] took the bottle I had in my hand, and he says, 'Give me the bottle,' and he filled the glass that he had in his hand so the whiskey ran over the counter on his hand, and it made me kind of sore, and I took the towel when he got through drinking and wiped that off, and I looked and see he was hanging on to the bottle with his right hand; and he says, 'Come out here a minute,'

(Testimony of Henry Ritter.)

so he stepped back here halfway in that room, so I went out from behind the bar, and went up past Harry Grier, and Harry says, 'This is for you; your name is on this, I don't know what it is.'

Q. What was it,—a piece of paper?

A. A piece of paper, and I took it, and Scott was begging to me to come out, and I walked over to Scott, and he says, 'You are pinched,' I says, 'What?' He says, 'You are arrested,' and he started to holler, and says, 'Come in, boys, come in, boys,' and Mr. Brown came in from the south of the barroom door, and those other two came in, and this white-haired man, I don't know who he was, he stood there, and they left him in charge of the liquor, his name was mentioned here yesterday, but I never knew his name before, and I think DuBois came in and I think Mr. Nash; I didn't see Carter.

Q. Did you get any money for that drink that you served Grier and the others?

A. I did not, I asked them to take a drink anyway."

Q. You asked them to take a drink? A. Yes.

Q. Did you see any money on the bar after they went out?

A. No, sir; there was no glasses on the bar, and no money either.

Q. You did see the money on the bar when you went upstairs? A. Before I went upstairs.
[70]

That no evidence was introduced and no testimony produced by the Government in the trial of

the case that showed any justification for the use of a decoy and the record discloses no facts that were established that prior to the 8th day of May, 1922, any complaint in reference to possession or sale of liquor had been lodged with the prohibition department, or that the prohibition department had any knowledge prior to the 8th day of May, 1922, that defendant, Ritter, was selling intoxicating liquors or had possession of intoxicating liquors at Bowers Mansion.

BE IT FURTHER REMEMBERED that the Court gave to the jury the following instructions:

Instructions of Court to the Jury.

“THE COURT.—Gentlemen, the indictment charges in the first count, that on or about the 10th day of May, 1922, in Washoe County, State of Nevada, these defendants wilfully and knowingly had in their possession intoxicating liquor. In the second count it alleges that on or about the 8th day of May, they sold intoxicating liquor. You will notice that the allegation is not that the sale took place on the 8th day, or that the possession was on the 10th day; but the allegation is that the possession was on or about the 10th day, and that the sale took place on or about the 8th; so it is not necessary that the Government should prove that the sale took place on the 8th; it is only necessary that it should prove that the whiskey was sold on or about that time, and before the finding of the indictment. And the same with reference to the possession. If they were found to have been in possession on that day, or about that day, and prior to the finding of

(Testimony of Henry Ritter.)

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this indictment, they would be guilty of the offense, provided it is found in the manner that I indicate later.

Section 3 of Title II of the National Prohibition Act declares that 'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect,' possess or sell intoxicating liquor, except as it is authorized in this Act. The Act defines what intoxicating liquor is in the first section of Title II. That I will read also:

'When used in Title II and Title III of this Act the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name, called, containing one-half of one per centum or more of alcohol by volume which are fit for use [71] for beverage purposes.'

We speak of a thing as a beverage which is taken and which we drink for the pleasure of drinking. It don't mean that it is wholesome to drink; it don't mean it is a wise thing to drink it; but if we drink it for the pleasure of drinking it, it is a beverage. It does not make any difference how good or how poor the intoxicating liquor is, if one drinks it for the pleasure of drinking it, and if it contains one-half of one percentum or more of alcohol by volume, it is prohibited by the statute.

It does not make any difference whether it is bonded goods, whether it is the best whiskey that was ever made, or the poorest, if it comes within this definition it is prohibited.

The possession of intoxicating liquor, as I have read you is prohibited by the statute. The possession must be a conscious possession. If a man has intoxicating liquor in a soft-drink place, and he knows he has it, he has violated the law, because there is nothing in the Prohibition Act which permits a man to have possession of intoxicating liquor in a soft-drink place, nothing that has ever been called to my attention.

The sale of intoxicating liquor of course carries with it the ordinary meaning of the term sale. No one shall sell intoxicating liquor; and the possession of intoxicating liquor we must assume as a rule existed, otherwise there could not be a sale. A man in a soft-drink place cannot sell any whisky in that soft-drink place if he has no whisky; so it would be very unwise to find a man guilty of selling intoxicating liquor at a certain time and at a certain place, and then to find that he had not liquor to sell. That is something that you must bear in mind as you go through this case.

The statute which I have read is known as the National Prohibition Act. It has been adopted by Congress, and it is based on a constitutional amendment. It is now the law of the land; and whether it is a good law or whether it is a bad law, whether it should have been passed, or whether it should not have been passed, or whether it should

be different from what it is *it* no concern of ours; we are here as jurors and members of this court, we are here to do our duty, and we are bound to try this case not according to the law we think it ought to be, but according to the law as it is, and according to the evidence, and a true verdict, render according to the law and the evidence.

You are bound to accept the law as I give it to you. That is the rule. You cannot speculate as to what the law is; you cannot follow your own conclusions as to what the law is, or what the law ought to be; you must accept it as given to you by the Court, and if you fail to follow it you are not marching up to the standard of duty prescribed for jurors in this court, or in any other court in this state. [72]

You are called upon, however, to pass on the facts. You are to remember that is your peculiar province. You are to consider the evidence which has been given upon the witness-stand; you cannot go beyond that evidence for your facts; you cannot indulge in any surmises, except as they are based upon that evidence. You are not to follow what the Court may say as to this testimony, or as to what it proves; neither are you to follow what the lawyers may have said in their argument. You are the final arbiters of what is proven by the evidence, and if you follow an expression of mine with reference to what is proven by this evidence simply because I make it, if it does not coincide with your own judgment you are not doing your duty. In other words, you must submit every question of fact

which has appeared in this case and which has been testified to, to your own judgment, under the law as it is given by the Court.

Each defendant is entitled in this case, as in every other, to the presumption that he is innocent until his guilt is proven beyond a reasonable doubt. This does not mean that his guilt must be proven beyond any doubt, or beyond every doubt; it is simply that it must be proven beyond a reasonable doubt. There is nothing absolutely certain in this world. In weighing this testimony you are supposed to weigh it as you would if it were an important matter in your own affairs. You will consider the probabilities; you will consider the truthfulness or the untruthfulness of the witnesses, the manner in which they give their testimony, whether they give it frankly, openly and willingly, and without any apparent evasion or attempt to escape from the consequences of an offense, if they have committed one, and whether they are actuated by a desire to tell the truth, the whole truth, and nothing but the truth.

Each witness who comes upon the witness-stand is subject to your scrutiny. You are to examine his testimony; you are to consider his motives, if any are disclosed; and you are to consider also how his testimony is contradicted, if it is contradicted, by the testimony of other witnesses in this case. That occurs in nearly every case, and it becomes your duty to weigh the testimony, and weigh it carefully to determine where the truth lies. If the witness has merely made a mistake that will

warrant you in being more careful in considering his testimony, and in determining whether his statements are correct or not; but if a witness has deliberately stated that which is untrue as to a material fact in the case, then you are at liberty to disregard the whole of his testimony except where it is corroborated by other credible evidence in the case.

There has been some testimony offered here as to good character. It is your duty to consider it, and weigh it with all other testimony in the case; and if the testimony as to good character, in connection with the other testimony in the case convinces you that the defendants have not been proven guilty beyond a reasonable doubt, it will be your duty to bring in a verdict of acquittal. On the other hand, if notwithstanding the evidence as to good character, you are convinced [73] that the defendants have violated the law, and you are so convinced by the testimony beyond a reasonable doubt, it is your duty to bring in a verdict of guilty.

It is wrong, and it is a violation of the law, for the purest, the best and the most upright man in the land to sell intoxicating liquor. It would be a violation of the law for the Governor of this state to have intoxicating liquor in a soft-drink place. It is immaterial how good a man's character is if he violates the law, and if you are convinced beyond a reasonable doubt that he has done so, it is your duty to bring in a verdict in accordance therewith.

There has been considerable said about an entrapment. Much of what has been said is worthy of

consideration. This great Government of ours is not engaged in the business of manufacturing criminals; it has enough to do to prevent crime. It is not expected to induce men to commit crime in order that they may be convicted and punished. It is unfortunate, however, that men do commit crime. It is unfortunate that this law is violated as frequently as it is. The fact that law is violated renders it necessary to have courts and juries, and to have officers and prohibition enforcement officers. The fact that a man is employed by the Government to suppress the traffic in intoxicating liquor is not a fact from which you are entitled to conclude that he cannot be mistaken, or, on the other hand, that he is unworthy of belief. You are to weigh his testimony just as you do the testimony of every other witness. If he seems to be swayed by improper motives, you are to consider such motives. You are entitled to remember with reference to the defendants themselves, that they are deeply interested in this case, and its outcome.

As I have said before, the Government is not engaged in manufacturing criminals, but it does become necessary for detectives, and the prohibition officers, to match their wits against the wits of the man who is deliberately, persistently, or frequently violating the law, or who has violated the law. Crime is not committed on the housetops, nor in the streets, as a rule; it is committed under such circumstances that the officers are not supposed to see it, and the public is not expected to witness it. But the decoy and the entrapment must be fair. I will

illustrate this by a case which occurred in Montana some years ago. An officer of the Government induced a Mexican, who looked very much like an Indian, to go into a saloon and purchase whiskey. The whiskey was sold, the saloon-keeper arrested, indicted, tried and convicted. The Court held that it was not a fair decoy, because the saloon-keeper did not know he was violating the law when he sold the whiskey to the Indian. It was a trap. The Indian appeared to be a Mexican, and the saloon-keeper had no reason to believe he was violating the law when he sold the whiskey to the Indian.

There is another case known as the Woo Wai case, which has been cited frequently. In that case a Chinaman [74] of some standing in Southern California was approached by a Government officer, who told him there was a great deal of money to be made in smuggling Chinamen across the international line from Mexico; the officer introduced the Chinaman to some of the revenue officers and explained the manner in which it could be done; Woo Wai said that will be violating the law, and the officer said to him, 'I will be there to assist you, these officers will be there, and you will not be arrested.' Thus they induced the Chinaman to engage in the business of smuggling Chinese across the line. He was promptly arrested the first time he committed an offense of that kind. He was tried, but the Court held a conviction under those circumstances could not stand.

The idea of the law is, however, that a man who is engaged in unlawful business may have an oppor-

tunity, and the Government officers may afford him an opportunity to commit a crime. If a Government officer goes into a place, asks for a drink of whiskey and it is given to him at his solicitation, convictions based on such evidence are frequently sustained.

These are merely illustrations. You are to remember that it is for you to determine from the evidence, and after a consideration of all of it, whether this was a fair decoy or not. And in considering whether it was fair, you are to consider all the surroundings; you will consider the fact that it occurred in a soft-drink place, you will consider the fact that the liquor was served in a certain kind of glasses; that a bottle was brought from a place outside the room, outside the soft-drink place; you will consider the quantity of whiskey found there subsequently or found on the 10th of May. You will consider the fact also *that was* a funnel with the bottles; and you will consider not only the whiskey found in those bottles, but you will consider and give such effect to the other testimony with reference to other bottles and jugs of the same kind which were found there, as you think proper.

There can be no question but that some one has violated the law. One of the defendants admits that he had this whiskey in his room. He had the two jugs. There is nothing I can see in that matter which is otherwise than a violation of the law.

There is conflicting testimony as to whether sales were made; but it is for you to weigh all of the testimony, and to determine therefrom whether

these defendants, or either or both of them, did sell whiskey at that time, or on or about the time alleged in this indictment.

There is quite a bit of testimony as to the amount of solicitation used to induce Mr. Ritter to give this whiskey, if he did give it; and about that there is a dispute in the testimony. You probably recollect the testimony of Mr. Scott, as to just what did occur, and what he asked and what he said; and you will also remember just what occurred when the three witnesses, Burris, Swearingen and Grier were there, their testimony and what efforts they used to procure the whiskey. You [75] will determine from that whether this was a voluntary sale made willingly, and made for the money which was involved in it, or whether defendants were the innocent victims of the officers who were designing to betray them to their harm."

Whereupon the jury retired and brought in a verdict finding the defendant, Henry Ritter, guilty as charged in the indictment.

The defendant thereupon moved the Court to set aside the verdict and grant a new trial for the following reasons:

I.

That the Court erred in its decision upon questions of law arising during the course of the trial.

II.

That the Court erred in refusing to give the jury the instruction requested by the defendant in reference to the use of a decoy.

III.

- That the verdict of the jury is contrary to law.

IV.

That under the testimony admitted to sustain the second count of the indictment the verdict should be set aside for the reason that the defendant, Ritter, was entrapped and persuaded by Government agents to commit the act which the jury found him guilty.

V.

That the verdict of the jury is contrary to the evidence.

But the Court overruled the motion, to which ruling the defendant then and there duly excepted.

The defendant, by his counsel, thereupon moved the Court to arrest the judgment for the following reasons: [76]

I.

Because the bill of indictment in this cause, and the first count of said indictment, wherein defendant is sought to be charged with unlawful possession of intoxicating liquor, is insufficient to support any judgment against him in this, to wit:

The indictment does not recite facts on said first count sufficient to constitute a public offense for the reason that possession is charged in Washoe County, Nevada, no place therein being designated and no averments or allegations are contained in said indictment which negatives the assumptions of fact, that said liquor charged to be in the possession of defendant may have been possessed by him in his private dwelling; the allegations in said indict-

ment that said possession was unlawful and in violation of the prohibition law is the statement of a conclusion.

II.

Because the bill of indictment under the second count is insufficient to support any judgment against defendant in this, to wit:

Said second count attempts to charge an alleged sale of intoxicating liquor in that defendant in violation of law did unlawfully sell intoxicating liquor fit for use as a beverage; the said allegations are insufficient in that there is no allegation or statement that said liquor so alleged to have been sold, was sold with the knowledge on the part of the seller (the defendant); that it was to be used for beverage purposes, or that the liquor so sold was used for beverage purposes.

In support of these two counts, the Court is respectfully referred to the testimony given in the case and [77] to the objections interposed by defendant at the outset of the trial, wherein counsel for defendant objected to the introduction of any evidence to support the allegations of the indictment, for the reason that the indictment failed to state facts sufficient to constitute a public offense, and therefore all testimony in support of the indictment was irrelevant, incompetent and immaterial.

III.

That the evidence introduced established that the defendant, Ritter, had been entrapped by prohibition officers into the commission of the alleged crime

charged in the second count of the indictment, and under which the jury found the defendant guilty.

But the Court overruled the motion, to which ruling of the Court the defendant, by his counsel, then and there duly excepted.

Thereupon the Court entered judgment upon the verdict and sentenced the defendant in the county jail of Washoe County, State of Nevada, for a period of four months, to which ruling and judgment of the Court the defendant, by his counsel, then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant with the plaintiff's amendments is correct in every particular, is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 31st day of March, A. D. 1923.

E. S. FARRINGTON,
United States District Judge. [78]

[Endorsed]: No. 5593. In the District Court of the United States of America in and for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Bill of Exceptions. Filed March 31, 1923. E. O. Patterson, Clerk. [79]

In the District Court of the United States for the
District of Nevada.

No. 5593.

UNITED STATES OF AMERICA

vs.

HENRY RITTER and D. CHURCH.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants, said case being No. 5593 on the docket of said court.

I further certify that the attached transcript, consisting of 81 typewritten pages numbered from 1 to 81, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such

clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$34.70, has been paid to me by Messrs. Boyd & Curler, attorneys for the defendant Henry Ritter in the above-entitled cause. [80]

And I further certify that the original writ of error and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and the seal of said United States District Court this 31st day of March, A. D. 1923.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.
[81]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
HENRY RITTER and D. CHURCH,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States of America, in and for the District of Nevada, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea is in the said District Court before you, or some of you, wherein the United States is plaintiff and Henry Ritter is one of the defendants, a manifest error hath happened, to the great damage of the said Henry Ritter as by the indictment in said cause and the record of proceedings therein appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, together with this writ, so that you have the same in the said United States Circuit Court of Appeals at San Francisco, California, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said [82] United States Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States of America, the 19th day of February, A. D. 1923.

[Seal] E. O. PATTERSON,
Clerk of the District Court of the United States for
the District of Nevada.

Allowed.

E. S. FARRINGTON,
Judge of the District Court of the United States for
the District of Nevada. [83]

[Endorsed]: No. 5593. In the District Court of
the United States in and for the District of Nevada.
United States of America, Plaintiff, vs. Henry
Ritter and D. Church, Defendants. Writ of Error.
Filed Feb. 19, 1923. E. O. Patterson, Clerk. [84]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

HENRY RITTER and D. CHURCH,
Defendants.

Citation.

The President of the United States to the United
States of America, GREETING:

To the United States of America:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, at the City of San
Francisco, State of California, within thirty days
from the date of this writ, pursuant to the writ of
error duly allowed by the District Court of the
United States, in and for the District of Nevada,
and filed in the clerk's office of said court on the

19th day of February, 1923, in a cause wherein Henry Ritter is appellant and you appellee, to show cause, if any, why the judgment and decree rendered against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States, in and for the District of Nevada, this 19th day of February, A. D. 1923, and of the Independence of the United States the one hundred and forty-seventh.

E. S. FARRINGTON,
District Judge.

[Seal] Attest: E. O. PATTERSON,
Clerk. [85]

Service of the within citation and receipt of a copy is hereby admitted this 19th day of February, A. D. 1923.

GEORGE SPRINGMEYER,
United States Attorney, District of Nevada.

[86]

[Endorsed]: No. 5593. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. Henry Ritter and D. Church, Defendants. Citation. Filed Feb. 19, 1923. E. O. Patterson, Clerk. [87]

[Endorsed]: No. 4004. United States Circuit Court of Appeals for the Ninth Circuit. Henry Ritter, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed April 5, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4004

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY RITTER,

Plaintiff in Error,

—VS—

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES T. BOYD,

Attorney for Plaintiff in Error.

No. 4004

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY RITTER,

Plaintiff in Error,

—VS—

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

During the May Term of the District Court of the United States of America for the District of Nevada, the Grand Jury for the District of Nevada found an indictment against Henry Ritter and D. Church, charging them with a violation of the National Prohibition Act. The indictment contained two counts against them.

The first count charges that the defendants,

“did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, fit for use for beverage purposes.”

The second count charges that the defendants, "did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent, or more of alcohol by volume, fit for use for beverage purposes."

The defendants were arrested under the indictment and were tried in the District Court of the United States for the District of Nevada, on the 15th day of December, 1922. The defendant, D. Church, was acquitted on both charges and the defendant, Henry Ritter was found guilty on both charges, and thereafter and on the 19th day of February, 1923, the defendant, Henry Ritter, was sentenced to be imprisoned in the County jail of Washoe County for a period of four months from and after that date.

The defendant, Henry Ritter, was allowed a writ of error to this Court for the alleged errors occurring in the proceedings during the trial of the said case.

After the impanelment of the jury, and prior to the introduction of any testimony the plaintiff in error, objected to the introduction of any evidence upon the ground that the indictment failed to state facts sufficient to constitute a public offense. Prior to sentence and within time the defendant made a motion in arrest of judgment, and also made motion for a new trial, both of which, were denied by the Court, and the defendant sentenced.

The plaintiff in error relies upon certain errors alleged to have been committed by the Court, and excepted to by the defendant and from the records they may be summarized as follows:

(1) That the indictment does not allege facts sufficient to show a violation of the National Prohibition Act.

(2) That the Court erred in admitting hearsay testimony over the objection of the plaintiff in error.

(3) That the Court erred in refusing to give the instruction requested by the plaintiff in error with reference to Decoys.

(4) That the Court erred in denying plaintiff's in error motion in arrest of judgment.

(5) That the Court erred in denying the motion of the plaintiff in error for a new trial.

Taking the first proposition advanced:

THAT THE INDICTMENT DOES NOT ALLEGE FACTS SUFFICIENT TO SHOW A VIOLATION OF THE NATIONAL PROHIBITION ACT.

The first count in the indictment alleges:

“did unlawfully, wilfully and knowingly have in their possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes.”

That this count is not sufficient, taken as true, to charge the plaintiff in error with the offense, for the reason that the National Prohibition Act does not make possession alone of intoxicating liquors to be an offense, as the law allows the plaintiff in error to have intoxicating liquor in his private dwelling for his own personal consumption, or for the use of such guests as he may have in his private dwelling. The intent of the Act being to prevent the possession of intoxicating liquor for sale.

See Prohibition Act, Title II, Section 33.

Nothing in the indictment negatives the fact that this liquor was not in the private dwelling of Henry Ritter, or was not for the use of himself or his family residing in such dwelling.

“In the absence of facts showing why the possession was unlawful, the indictment charging “the defendant did unlawfully possess etc., is a mere conclusion.” where the liberties of the defendant are involved, all the facts necessary to bring the case within the intent of the Act must be alleged, as no intendments can be indulged in favor of the indictment.”

United States v. Horton, 282 Fed. 731.

Keck v. United States, 172 U. S. 434.

While the National Prohibition Act makes possession of intoxicating liquor for beverage purposes unlawful, Section 33 of Title II of the Act provides that it shall not be unlawful to possess liquor for the use of himself in his own private dwelling, etc.

United States v. Boasberg, 283 Fed. 311.

The facts set out in the second count of the indictment nowhere allege that the plaintiff in error, Henry Ritter, sold the liquor with the knowledge that it was to be used for beverage purposes, or that the liquor so sold was used for beverage purposes. The authorities heretofore cited sustain this proposition.

THAT THE COURT ERRED IN ADMITTING HEARSAY TESTIMONY OVER THE OBJECTION OF THE PLAINTIFF IN ERROR.

During the course of the trial the witness, Thomas Scott, testified that after the arrest of Mr. Ritter, he informed Officer Nash in the presence of Henry Ritter, that Mr. Church had sold the drinks. This the plaintiff in error objected to on the ground that the testimony was immaterial, irrelevant, and incompetent.

See page 54 of the Transcript of Record.

Mr. Nash in his testimony stated:

“Mr. Scott told me that Mr. Church sold the drinks and Mr. Ritter brought in the bottle.”

See page 73 of the Transcript of Record.

This testimony was admitted over the objections of the plaintiff in error.

The testimony given does not enter into the elements of the offense, nor is it a part of the Res Gestae for the reason that it is merely the report of

one officer to another of what had transpired and is a description of a past event.

The testimony of Mr. Nash before the jury in that particular was not the testimony of a fact that had occurred but merely a testimony of what Mr. Scott had told him after the alleged offense had been completed, and was purely hearsay, Mr. Nash having no actual knowledge of the offense.

See Jones on Evidence, Section 299.

Hauger v. United States, 173 Fed. 54.

Greenleaf on Evidence, Volume 1, page 182-3-4.

William Vaughn v. Oklahoma, 42 L.R.A., 889 (N.S.)

Bergen v. People, 17 Ill., 426.

State v. Reidel, 26 Iowa, 430.

Cheek v. State, 35 Ind., 492.

State v. Vincent, 24 Iowa, 570.

THAT THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY THE PLAINTIFF IN ERROR WITH REFERENCE TO DECOYS.

The instruction requested by the plaintiff in error, Henry Ritter, should have been given. It was taken bodily from the Peterson Case that had been previously passed and approved by this Court.

See page 11 of the Transcript of Record.

Henry Ritter's defense to the first count of the

indictment was that he had been induced by the officers to give them liquor. That it was a very cold day, the wind blowing and also snowing, when Officers Scott and DuBois, came to his place as they claimed to be cold and were shivering and kept continually asking him to give them a drink on account of their condition, in fact working upon the sympathies of Ritter, until finally Ritter did in fact give them the liquor they asked for. That they had spent over twenty minutes to half an hour, at least, coaxing him for a drink. They both left the place and returned in about three quarters of an hour, and commenced asking again for drinks and he gave them the drinks the second time.

See Ritter's testimony, pages 82, 83 and 84 of the Transcript of Record.

We think the testimony of Ritter justified the giving of the instruction requested.

Officers ought not to be allowed to take advantage of the Act of Ritter after they had made the appeal they did to his sympathies and influenced him in the matter wherein the average man is most easily influenced. The Court in its opinion simply refused to follow the Peterson Case (see page 56 of the Transcript of Record) and stated frankly from the bench in answer to Mr. Diskin "that the instruction was taken from the case of the United States v. Peterson."

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State v. Vincent, 24 Iowa, 570.

THAT THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION REQUESTED BY THE PLAINTIFF IN ERROR WITH REFERENCE TO DECOYS.

The instruction requested by the plaintiff in error, Henry Ritter, should have been given. It was taken bodily from the Peterson Case that had been previously passed and approved by this Court.

See page 11 of the Transcript of Record.

Henry Ritter's defense to the first count of the

indictment was that he had been induced by the officers to give them liquor. That it was a very cold day, the wind blowing and also snowing, when Officers Scott and DuBois, came to his place as they claimed to be cold and were shivering and kept continually asking him to give them a drink on account of their condition, in fact working upon the sympathies of Ritter, until finally Ritter did in fact give them the liquor they asked for. That they had spent over twenty minutes to half an hour, at least, coaxing him for a drink. They both left the place and returned in about three quarters of an hour, and commenced asking again for drinks and he gave them the drinks the second time.

See Ritter's testimony, pages 82, 83 and 84 of the Transcript of Record.

We think the testimony of Ritter justified the giving of the instruction requested.

Officers ought not to be allowed to take advantage of the Act of Ritter after they had made the appeal they did to his sympathies and influenced him in the matter wherein the average man is most easily influenced. The Court in its opinion simply refused to follow the Peterson Case (see page 56 of the Transcript of Record) and stated frankly from the bench in answer to Mr. Diskin "that the instruction was taken from the case of the United States v. Peterson."

The Court—"Yes, I understand that, and I cannot follow it. It simply means this, if I understand that instruction: If a Federal official goes into a soft-drink place, asks for a drink of whiskey and gets it, the man who sells it is not guilty. I cannot understand it any other way; and this is not the decision in the Circuit Court of Appeals in this district by later authorities."

The learned Judge that tried this case was not warranted in his criticism by anything appearing in the Peterson Case, in fact the trial Judge seemed to labor under a misapprehension of the facts in that case, and his criticism of the decision in that case was clearly out of place, for that case merely reiterated principles of law heretofore approved by many Courts and was a clear deduction of the effect of many former decisions, both in United States Courts and State Courts.

See *Peterson v. United States*, 255 Fed. 433.

Taylor v. United States, 193 Fed. 968.

Woo Wai v. United States, 223 Fed. 412.

Sam Yick et al v. United States, 240 Fed. 60.

The statement was made in the presence of the Jury, and may have had a very determining influence upon the minds of the jurors as to what was the law of this case.

We have been unable to find any authorities, or any decision of this Court modifying in the slightest

degree the rule laid down with so much vigor by this Court in the Peterson Case.

We think it unnecessary to enter into any extended argument in support of the proposition advanced in this brief in support of the plaintiff's contention. The errors complained of are clearly set out in the Transcript.

On account of the defects in the indictment as pointed out herein, we think that the Court erred in not granting the motion in arrest of judgment and that the motion should have been granted, and further, on account of the errors occurring during the trial of the cause and the refusal to give the instruction, the Court should have granted the motion for a new trial.

We respectfully submit that the action and decision of the Trial Court should be reversed and be directed to grant the motion in arrest of judgment, or at least a new trial should be granted the appellant in error.

JAMES T. BOYD,
Attorney for Plaintiff in Error.

No. 4004

In the United States
Circuit Court of Appeals
For the Ninth Circuit
October Term, 1923

HENRY RITTER,	}
Plaintiff in Error,	
— vs —	
THE UNITED STATES OF AMERICA,	
Defendant in Error.	}

Brief for Defendant in Error

GEORGE SPRINGMEYER,
United States Attorney.

CHAS. A. CANTWELL,
Assistant United States Attorney

No. 4004

In the United States
Circuit Court of Appeals

For the Ninth Circuit

October Term, 1923

HENRY RITTER,

Plaintiff in Error,

—vs—

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

As nearly as may be, defendant in error will follow the plan of the brief of plaintiff in error.

1.

Plaintiff in error asks a reversal upon the ground, first, that the indictment does not allege facts sufficient to show a violation of the National Prohibition Act in that it does not negative the

fact that liquor was not in the private dwelling of defendant, and was not for his or his family's use.

In the case of *Herine* against the United States 276 Federal, 806, this Circuit Court held sufficient a count that on a certain day in certain premises the defendant knowingly, wilfully and unlawfully, and in violation of the National Prohibition Act maintained a common nuisance in keeping intoxicating liquor fit for use for beverage purposes.

In the *Herine* case the count was for a common nuisance; in the case at bar the count complained of was for possession. If, in the common nuisance count, it is unnecessary to negative the fact that liquor was in a private dwelling or was for family use, it should not be necessary in a possession count.

In *Young vs. United States* 272 Fed. 967, this Circuit Court held good an indictment that defendants at a stated time and place in violation of the National Prohibition Act, maintained a common nuisance by unlawfully, wilfully and knowingly selling and keeping for sale for beverage purposes intoxicating liquor, to-wit: whiskey.

In *Hensberg vs. United States*, 288 Fed. 371, the Court held good an indictment that "defendant unlawfully, and wilfully, and in violation of the National Prohibition Act, sold intoxicating liquor, to-wit: one-half pint of whiskey, contrary to the form of the statute in such case made and provided".

Section 32 of Title II of the National Prohibition Act provides:

“It shall not be necessary in any affidavit, information or indictment to give the name of the purchaser, or include in the affidavit negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful.”

The following cases bear out the cases from which quotations are given:

Rulovich vs. U. S. 286 Fed. 315, x
 Rudner vs. U. S. 281 Fed. 516,
 Davis vs. U. S. 274 U. S. 928,
 U. S. vs. Simmons 96 U. S. 360, 24 L. Ed. 819.

Finally, it is the general rule that following the language of the statute is sufficient if the accused is informed of the specific offense. See:

Garland vs. S. 232 U. S. 642, 56 L. Ed. 772.
 Miller vs. U. S. 288 Fed. 816.
 Oliver vs. U. S. 267 Fed. 544.

II.

As a second reason for reversal, plaintiff in error asserts that the Court erred in admitting evidence of Mr. Scott that during the arresting of the plaintiff in error and while the liquor was being seized, the witness informed officer Nash in the presence and hearing of plaintiff in error that the plaintiff in error had sold the drinks, and in admitting the testimony of officer Nash that Scott had told him in the presence and hearing of the plaintiff in error that Church sold the drinks and Ritter brought in the bottle.

It is believed that the evidence was properly admitted as an exception to the heresay rule, not

only as part of the *res gestae*, but also as an admission by assent. The statements were contemporaneous with the crime, and they were made in the presence and hearing of plaintiff in error, and were not denied.

“Wharton defines *res gestae* as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act *
* * THEY MAY CONSIST OF SPEECHES OF ANYONE CONCERNED, WHETHER PARTICIPANT OR BYSTANDER * * * WHEN DECLARATIONS OR ACTS ACCOMPANY THE FACT IN CONTROVERSY AND TEND TO ILLUSTRATE OR EXPLAIN IT, THEY ARE TREATED, NOT AS HERESAY, BUT AS ORIGINAL EVIDENCE, IN OTHER WORDS, AS PART OF THE *RES GESTAE* * * * In the celebrated case in which Lord George Gordon was on trial for treason, the cries of the mob which accompanied the defendant during the acts complained of were received for the purpose of showing that his intentions were unlawful and treasonable.” Jones on Evidence, Sec. 344, and citations.

“If the declaration or act forms a part of the *res gestae*, it is admissible on grounds elsewhere discussed, not only as an admission affecting the declarant but as substantive evidence.” Jones Sec. 254.

“The rule allowing the silence of a person to be taken as an implied admission of truth of allegations uttered in his presence applies in criminal as well as in civil cases.” Jones on Evidence, Sec. 290, citing cases.

“As some of the cases already cited illus-

trate, admissions may sometimes be implied from the mere silence of a party * * * *

IT APPLIES TO CERTAIN DECLARATIONS OF A THIRD PERSON ADDRESSED TO A PARTY AND NOT DENIED * * * * *

Generally, the cases in which the party is held to be affected by his silence will be found to be cases where statements were made of his own actions or his own liabilities, and not where he had no concern in law and no right to reply * * *

IF HE IS SILENT WHEN HE OUGHT TO HAVE DENIED THE PRESUMPTION OF ACQUIESCENCE ARISES." Jones on Evidence, Sec. 289, and citations.

"When by a party's silence an assent is given to the assertion of a third person, that assent is thereby adopted by the party and therefore may be used against him as his own statement and admission." Wigmore, 2nd Ed. Sec. 1052, citing cases.

"By way of specific rule carrying out the principle already examined it is sometimes said that the proponent of the evidence must say not merely that the party was present when the remark was made (presence of course implies proximity within a distance sufficient to permit hearing) but also that the party actually heard and understood what was said. But this seems too strict. The presence of a party may be assumed to indicate that he heard and understood. So also it is sometimes said that the proponent must show that the party had knowledge of the facts stated since otherwise he might have hesitated to contradict. This again is perhaps too strict, for a party's admission is receivable irrespective of his personal knowledge."

"Certain distinct principles need here to be

discriminated: Silence on the part of an accused person has sometimes a circumstantial significance, not by way of assent to a third person's statement, but as indicative of a consciousness of guilt."

"The failure to protest one's innocence on being arrested for a crime leads to the question whether the fact of such protestation may be shown to repel in advance the inference that might otherwise have been made." Wigmore Sec. 284, P. 584, and cases cited.

"BUT UNDER THE PRESENT EXCEPTION THAT NERVOUS EXCITEMENT WHICH RENDERS AN UTTERANCE ADMISSIBLE MAY EXIST EQUALLY FOR A MERE BYSTANDER AS WELL AS FOR THE INJURED OR INJURING PERSON, AND THEREFORE THE UTTERANCES OF EITHER CONCERNING WHAT THEY OBSERVED ARE EQUALLY ADMISSABLE."

"Fortunately there has been little inclination towards the error of fixing upon the present exception the inappropriate limitation of the verbal act doctrine. In a few courts the declarations of a mere bystander have been excluded. But in the greater number no such discrimination is made, assuming that the bystander's declarations relate only to that which has come under his observation." Wigmore Sec 1766, and cases cited.

Among pertinent cases, the following may be referred to:

State vs. Desroches, 12 So., 250. (Utterance of a bystander during a robbery identifying the defendant admitted.)

State vs. Duncan, 22 S. W., 699. (Bystander to an arresting officer, "There is the man that did it", admitted.)

State vs. Carraway, 107 S. E. 142. (Bystander's exclamation admitted.)

Amer. Mfg. Co. vs. Bigelow, 188 Fed. 34.

(Statement of plaintiff's agent immediately after accident in answer to plaintiff's statement that the act had caused her injuries, "Well, it is too late now", admitted within the principle of *res gestae*.)

Sorrensens vs. U. S. 168 Fed. 785 at 792. (Statement in presence of defendant admitted upon showing that defendant heard it and assented to it by silence.)

III.

As a third and final ground for reversal, plainaiff in error argues that the trial court erred in refusing to give plaintiff in error's requested instruction with reference to decoys. Plaintiff in error says the instruction was taken bodily from the Peterson case decided by this Court in 255 Fed. 433. The statement is not entirely accurate in that in the requested instruction by plaintiff in error, after the word "importunities" (line 16 page 35 transcript of record) there were omittd the words "FALSE STATEMENTS", while after the word "liquor" in line 18 there were omitted the words, "ADMITTEDLY FOR THE PURPOSE OF ENTRAPPING HER INTO THE COMMISSION OF THE OFFENSE". The words "false statements" and "admittedly for the purpose of entrapping her into the commission of the offense" were included in the Peterson requested instruction.

Also, there was entirely omitted in the instant case the 7th requested instruction which the Court

in the Peterson case held should have been given with the sixth instruction. In this seventh instruction there were specifically included the following:

“Under the statements that the last two named persons were friends of Rose, WHICH STATEMENTS WERE WILFULLY FALSE, AND MADE FOR THE PURPOSE OF DECEIVING AND INVEIGLING THE DEFENDANT INTO A VIOLATION OF THE LAW and that yielding to the importunities the defendant did procure from her private source of liquor the three bottles testified to by officers Hand and Geris, and you further believe that defendant without such solicitation and importunities would not have violated the law, then it is your duty to acquit the defendant for the reason heretofore stated, that the Federal Courts do not uphold convictions for offenses committed under the instigation of Government agents.”

At the outset, it is desired to point out that the Peterson case is admittedly sound and that the criticism by the trial Court in the instant case, so elaborately referred to by plaintiff in error, was not of that decision but of the applicability of plaintiff in error's requested instruction.

The Peterson case did not involve the National Prohibition Act, but merely a violation of the Selective Draft Act, which made it unlawful to sell intoxicants to soldiers during the war; a matter which is of vital importance in the question of whether plaintiff in error's requested instruction was properly refused. In the Peterson case it was

unlawful to sell intoxicants to soldiers, but it was not unlawful to possess intoxicating liquor. But at the time plaintiff in error was arrested, it was unlawful to possess corn whiskey as he did. The instant case may further be distinguished from the Peterson case in the following important particulars:

1. In the Peterson case the scheme of selling intoxicants originated with the officers, for it was not unlawful for Peterson to possess intoxicants, it simply being unlawful for her to sell to soldiers, and the officers urged her from six o'clock until nine o'clock to make the sale before she yielded; in the Ritter case the scheme did not originate with the officers, for the defendant had the liquor in his possession unlawfully, it being corn-whiskey which was manufactured subsequent to the passage of the National Prohibition Act, (Transcript of Record, page 20) and the officers on one occasion only, and then only for a short time, did anything in the way of begging him to give them liquor, while on three other occasions the sales by plaintiff in error Ritter were made without any solicitation by officers, and at least two of such alleged sales in fact were not made to officers at all. Under such circumstances, can it be said that the Peterson instruction necessarily applies?

2. In the Peterson case false representations were made to the defendants by the officers and detectives. But in the case at bar the arresting officers made no false statements. This is made clear by the fact that plaintiff in error Ritter omitted

from his requested instructions the statements which were inserted in the Peterson instructions, to which attention has already been called. Those statements are, "and false statements", and "admittedly for the purpose of entrapping her into the commission of the offense", and "under the statements that the last two named persons were friends of Rose which statements were wilfully false and made for the purpose of deceiving and inveigling the defendant into a violation of the law".

The situation in the principal case is precisely as in the case of *Lucadamo vs. United States*, 280 Fed. 653 at 657, where the Court said, "So where a scheme does not originate with a defendant, and he is lured into the conspiracy by an officer of the law he cannot be held for the offense, for in the contemplation of law no crime has been committed, BUT THE EVIDENCE HERE INDICATES THAT THE GOVERNMENT AGENTS SUSPECTED OR KNEW THAT THE DEFENDANTS BELOW WERE TRAFFICING IN DRUGS, AND THE GOVERNMENT AGENTS BARGAINED WITH THEM FOR THE SALE OF SUCH DRUGS. THIS THE DEFENDANT BELOW WAS PERFECTLY WILLING TO DO FOR A FAIR PROFIT. THEY HAD THE DRUGS OR KNEW WHERE TO GET THEM, AND WANTED TO SELL THEM. NO REPRESENTATIONS WERE MADE TO THEM OF ANY KIND. THEY TREATED THE OFFICERS OF THE LAW AS IF THEY WERE BUT ORDINARY PURCHASERS. UNDER THESE

CIRCUMSTANCES, THEY CANNOT BE HEARD TO COMPLAIN OF ENTRAPMENT, AND ESCAPE FROM THEIR UNLAWFUL INTENT TO VIOLATE THE LAW.”

3. In the Peterson case there was only one sale on one particular occasion, but in the principal case there were two or three sales on May 8, 1923, and one sale on May 10, 1923.

As heretofore pointed out, on only one of three or more sales was there any solicitation by officers, and on at least two of the sales the purchasers were private individuals not connected in any way with the officers.

The requested instruction of plaintiff in error, however, applies to all sales, for it expressly asserts, “the defendant Ritter claims that he was entrapped into selling the liquor through the instigation of prohibition officers”, and “you are instructed that if you believe from the evidence that defendant was induced by the importunities of the Government agent or agents to violate the law * * * * that the defendant Ritter was induced to sell liquor, and that defendant Ritter would not otherwise have violated the law, then you should return a verdict of not guilty”.

The first sale upon which there was evidence was at 3:35 o'clock P. M. May 8, 1922, to officers Scott and DuBois, on which occasion plaintiff in error Ritter claims he was lured or persuaded to sell by the statements of the officers that they were very cold. (Transcript p. 58, 61, 82). The second sale was at 4:20 P M. May 8, 1922, after

the defendants had returned from a trip to a nearby place. Plaintiff in error does not claim that on this occasion he was lured into doing anything wrong. (Transcript p. 59, 61, 83).

The officers testified that on the second occasion, that is at 4:20 P. M. May 8, 1922, there were a man and a woman in the bar-room, drinking brown liquid from whiskey glasses at the bar. (Transcript p. 51-84). Might not the jury have found that a sale? The last occasion of a sale (this may be called either the third or fourth sale) was on May 10, 1922, when plaintiff in error served whiskey to witnesses Grier, Swearingen and Burris—all private citizens—in whiskey glasses, at the bar in the bar-room, and someone placed some money (from \$2.50 to \$5.00, according to witnesses) on the bar, which was there a few minutes later when plaintiff in error was arrested by officer Scott, who entered while the others were drinking and was himself served with whiskey by plaintiff in error at the bar before the arrest. There was no claim that defendant was lured or enticed into serving the liquor to Grier Swearingen or Burris. (Transcript p. 51, 52, 59, 60, 62, 63, 64, 65, 71, 73, 76).

The indictment alleges (Transcript p.p. 2 and 3) that on or about the 8th day of May, 1922, plaintiff in error did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent., or more, of alcohol by volume, fit for use for beverage purposes. The names of the purchasers are not given, and it is clear that the

evidence as to all four sales was proper, and it was admitted without objection or exception.

4. Under the requested instruction the jury would have been bound to find a verdict of not guilty if on one occasion there was an improper decoy, regardless of whether on the other occasions there was no decoy. Plaintiff in error should have segregated his instructions to include separate facts or included all the facts in the requested instruction instead of selecting only those facts having to do with the decoy.

“Instructions which do not properly hypothesize all the facts should be refused.” *Blashfield* p. 76.

“It is improper to give an instruction dealing with but one fact in evidence, or to give instructions ignoring material evidence, issues and theories.” *Blashfield* p.26.

“Where the right of action or defense rests upon several questions of fact an instruction making the question turn upon the finding as to one point and ignoring the others is erroneous and may be refused. A refusal of instructions defective in this regard is of course proper. And error can in no case be predicated on such refusal.” *Blashfield* p. 219-220.

“It is also the rule that instructions may not ignore material evidence or be drawn so as to exclude such evidence from the consideration of the jury.” *Blashfield* p. 226, citing:

Rio Grande Western Railway Company vs. Leak, 163, U. S. 280, 41 L. Ed. 160.

Allison vs. U S. 160 U. S. 203, 40 L. Ed. 395.

See also: *Zoline*, *Federal Criminal Law & Procedure*, Sec. 437.

16 *Corpus Juris* Sec. 2356, 2358, 2502.

5. In the *Peterson* case the trial Court did not

instruct the jury correctly and did not properly cover the matter of entrapment. The Circuit Court expressly called attention to the fact that in the trial Court's instructions it was said, "There is raised only one real question of law in the case", and that, "the difficulty with the learned Judge of the trial Court below was that he treated the question as to whether or not the defendant was expected to commit the crime by the officers as a question of law, and not of fact", and "it is obvious that the case did not present any question of law for the jury to determine, and only one controverted question of fact, that is to say: whether or not the defendant was expected by the officers to sell the beer". BUT IN THE CASE AT BAR THE TRIAL COURT DID NOT REPEAT THE MISTAKE OF THE PETERSON CASE BY SAYING THERE IS RAISED ONLY ONE QUESTION OF LAW IN THE CASE, OR ANYTHING TO THAT EFFECT, AND HE DID PROPERLY INSTRUCT THE JURY AS TO ENTRAPMENT. The instructions of the Court as to entrapment are as follows:

"There has been considerable said about an entrapment. Much of what has been said is worthy of consideration. This great Government of ours is not engaged in the business of manufacturing criminals; it has enough to do to prevent crime. It is not expected to induce men to commit crime in order that they may be convicted and punished. It is unfortunate, however, that men do commit crime. It is unfortunate that this law is violated as frequently as it is. The fact that law is violated

renders it necessary to have courts and juries, and to have officers and prohibition enforcement officers. The fact that a man is employed by the Government to suppress the traffic in intoxicating liquor is not a fact from which you are entitled to conclude that he cannot be mistaken, or, on the other hand, that he is unworthy of belief. You are to weigh his testimony just as you do the testimony of every other witness. If he seems to be swayed by improper motives, you are to consider such motives. You are entitled to remember with reference to the defendants themselves, that they are deeply interested in this case, and its outcome.

“As I have said before, the Government is not engaged in manufacturing criminals, but it does become necessary for detectives, and the prohibition officers, to match their wits against the wits of the man who is deliberately, persistently, or frequently violating the law, or who has violated the law. Crime is not committed on the housetops, nor in the streets, as a rule; it is committed under such circumstances that the officers are not supposed to see it, and the public is not expected to witness it. But the decoy and the entrapment must be fair. I will illustrate this by a case which occurred in Montana some years ago. An officer of the Government induced an Indian, who looked very much like a Mexican, to go into a saloon and purchase whiskey. The whiskey was sold, the saloon-keeper arrested, indicted tried and convicted. The Court held that it was not a fair decoy, because the saloon-keeper did not know he was violating the law when he sold the whiskey to the Indian. It was a trap. The Indian appeared to be a Mexican, and the saloon-keeper had no reason

to believe he was violating the law when he sold the whiskey to the Indian.

“There is another case known as the Woo Wai case, which has been cited frequently. In that case a Chinaman (74) of some standing in Southern California was approached by a Government officer who told him there was a great deal of money to be made in smuggling Chinamen across the international line from Mexico; the officer introduced the Chinaman to some of the revenue officers and explained the manner in which it could be done; Woo Wai said that will be violating the law and the officer said to him ‘I will be there to assist you, these officers will be there, and you will not be arrested’. Thus they induced the Chinaman to engage in the business of smuggling Chinese across the line. He was promptly arrested the first time he committed an offense of that kind. He was tried, but the Court held a conviction under those circumstances could not stand.

“The idea of the law is, however, that a man who is engaged in unlawful business may have an opportunity and the Government officers may afford him an opportunity to commit a crime. If a Government officer goes into a place, asks for a drink of whiskey and it is given to him at his solicitation, convictions based on such evidence are frequently sustained.

“These are merely illustrations. You are to remember that it is for you to determine from the evidence, and after a consideration of all of it, whether this was a fair decoy or not. And in considering whether it was fair, you are to consider all the surroundings; you will consider the fact that it occurred in a soft-drink place, you will consider the fact

that the liquor was served in a certain kind of glasses; that a bottle was brought from a place outside the room outside the soft-drink place; you will consider the quantity of whiskey found there subsequently or found on the 10th of May. You will consider the fact also that was a funnel with the bottles; and you will consider not only the whiskey found in those bottles, but you will consider and give such effect to the other testimony with reference to other bottles and jugs of the same kind which were found there as you think proper."

In the case of *Billingsley vs. U. S.* 274 Fed. 86-89, a National Prohibition Act case, the Court expressly approved an entrapment instruction similar to the one given by the trial Court in the instant case.

An elementary proposition of law is that it is unnecessary to give a requested instruction when the subject matter has already been covered properly. See:

16 *Corpus Juris* p. 1063, and citations, *Blashfield* p. 426-431-437.

Manchard vs. Griffon 140 U. S. 516-535, L. Ed. 527.

Ind. etc. Ry. vs. Horst 93 U. S. 291, 23 L. Ed. 898.

Denver, etc. Ry. vs. Roller, 100 Fed. 738.

Bennett vs. U. S. 227 U. S. 333.

Holt vs. U. S. 218 U. S. 245.

It is almost needless to add that there is nothing in the suggestion of the plaintiff in error that there should be a reversal because the trial judge's statements were made in the presence of the jury. The rule in federal courts is that the trial judge may

sum up the facts and express his opinion on them. De Jianne vs. United States, 282 Fed. 737. See also Zoline, Federal Criminal Law & Procedure, Sec. 434.

It is earnestly urged that on not one of the grounds argued is plaintiff in error entitled to a new trial.

Respectfully submitted,

GEORGE SPRINGMEYER,
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CHAS. A. CANTWELL,
Assistant United States Attorney.

United States
7
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For the Ninth Circuit.

J. MONTELATICI,

Plaintiff in Error,

VS.

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Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
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FILED

APR 19 1923

F. B. MICHENER

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Names and Addresses of Attorneys of Record.

Mr. M. M. DETCH, Reno, Nevada,
For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United
States Attorney for the District of Nevada,
Reno, Nevada, and Honorable C. A. CANT-
WELL, Assistant United States Attorney for
the District of Nevada, Reno, Nevada,
For the Defendant in Error. [1*]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

**Indictment for Violation of the National Prohibi-
tion Act.**

United States of America,
District of Nevada,—ss.

Of the May Term of the District Court of the
United States of America, in and for the District
of Nevada, in the year of our Lord one thousand
nine hundred and twenty-two:

The Grand Jurors of the United States of
America, chosen, selected and sworn, within and

*Page-number appearing at foot of page of original certified Tran-
script of Record.

for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May, A. D. 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly have in their possession [2] intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

SECOND COUNT.

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May A. D. 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indict-

ment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

THIRD COUNT.

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May, A. D. 1922, at Reno, Washoe County, State and [3] District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indictment, in violation of Section 21, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did unlawfully, wilfully and knowingly maintain a common nuisance, in that the said defendants did unlawfully, wilfully and knowingly keep in that certain building situate at number 246 Lake Street in the City of Reno, County of Washoe, State and District of Nevada, known as and called the "New Tuscano Hotel," intoxicating liquor for sale; said liquor containing one-half of one per cent, or more of

alcohol by volume, and being fit for use for beverage purpose.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,
United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment: P. Nash.

[Endorsed]: No. 5495. United States District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari Indictment for Violation of the National Prohibition Act. A true bill. W. P. Harrington, Foreman. Filed in open court this 12th day of May, A. D. 1922. E. O. Patterson, Clerk. Dec. 1, Lazzari 5 months—\$350.00 and costs. Jany. 12, Montelatici, 4 months and costs. [4]

Bench Warrant.

UNITED STATES OF AMERICA,
District of Nevada.

To the Marshal of the United States for the District of Nevada, and to His Deputies and Any or Either of Them, GREETING:

WHEREAS, at a District Court of the United States of America, begun and held at Carson City, Nevada, within and for the District aforesaid, on the 1st day of May, 1922, the Grand Jurors in and

for said District brought into said court a true bill of indictment against J. Montelatici and A. Lazzari, charging them with the crime of having on or about May 3d, 1922, at Reno, in the county of Washoe, District of Nevada, violated the National Prohibition Act by unlawfully, wilfully and knowingly having in their possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and maintaining a common nuisance in that they kept for sale intoxicating liquor in that certain building situate at 246 Lake Street, City of Reno, State and District of Nevada, known as and called the "New Tuscano Hotel," as by said indictment now remaining on file and of record in said Court more fully appears, to which indictment the said J. Montelatici and A. Lazzari hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said J. Montelatici and A. Lazzari, and bring them before said Court in Carson City, Nevada, to answer unto said indictment May 15, 1922, or, if — requires it that you take — before the Judge of said Court, or any United States Commissioner in said District, that — may give bail in the sum of — present bail sufficient to answer said indictment.

WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal

thereof hereunto affixed, at Carson City, Nevada,
this 12th day of May, 1922.

[Seal]

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy.

GEORGE SPRINGMEYER,

U. S. Attorney. [5]

MARSHAL'S RETURN.

Executed the within Bench Warrant on the
within named defendants, at Carson City, Nevada.
on the 15th day of May, 1922, and I now have
them before the U. S. District Court at Carson
City, Nevada, this 15th day of May, 1922.

J. H. FULMER,

U. S. Marshal.

By J. P. Fodrin,

Deputy.

[Endorsed]: No. 5495. United States District
Court, District of Nevada. The United States vs.
J. Montelatici and A. Lazzari. Bench Warrant.
Filed on return this 20th day of May, 1922. E. O.
Patterson, Clerk. By O. E. Benham, Deputy Clerk.
Criminal Docket No. 3414.

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Verdict (J. Montelatici).

We, the jury in the above-entitled case, find the defendant, J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,

Foreman.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Verdict. Filed this 25th day of Nov., 1922. E. O. Patterson, Clerk.

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Verdict (A. Lazzari).

We, the jury in the above-entitled case, find the defendant, A. Lazzari, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,
Foreman.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Verdict. Filed this 25th day of Nov., 1922. E. O. Patterson, Clerk. [6]

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Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—May 12, 1922—Order for Capias Issued.

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, IT IS ORDERED that a capias issue herein returnable Monday, May 15th, 1922, at ten o'clock A. M.; and IT IS FURTHER ORDERED that the present bond of the said defendants be,

and they are hereby, considered sufficient and remain the same.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—May 15, 1922—Arraignment.

These defendants appeared this day with their attorney, Mr. F. Raffetto and were thereupon duly arraigned on the indictment as required by law. They each declared their true name to be as stated in the indictment and entered pleas of not guilty thereto. [7]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—May 27, 1922—Order Setting
Date of Trial.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on July 5, 1922, to follow case No 5488.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—July 24, 1922—Order Setting Date of Trial.

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on August 15, 1922, to follow case No. 5488.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—November 20, 1922—Order Setting Date of Trial.

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on November 23, 1922, at ten o'clock A. M.
[8]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—November 24, 1922—Trial.

This cause coming on regularly for trial this day, Mr. C. A. Cantwell, Assistant United States Attorney, appeared for and on behalf of the plaintiff; Messrs. Frame & Raffetto for the defendants,—the defendants being personally present. The following named jurors were accepted by the parties and duly sworn to try the issue, viz: Thomas Rowe, A. B. Dickinson, Fritz Behrman, Charles Miller, L. Radcliffe, Benjamin Barbash, M. Jacobsen, Fred Allerman, C. F. Stock, Herbert Maxson, Howard Sullivan and Charles A. Brulin. At 4:30 P. M. the jury was admonished by the Court not to talk among themselves about the case, nor to allow others to talk to them about it or in their presence concerning it and to refrain from making up their minds as to what their verdict would be until the case was finally submitted to them and they were excused until ten o'clock to-morrow morning.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A LAZZARI.

**Minutes of Court—November 25, 1922—Trial (Con-
tinued).**

The same counsel, the defendants and the jury being present the further trial of this case was resumed this day. The clerk read the Indictment to the jury and stated the pleas of the defendants. Upon motion of Mr. Frame plaintiff's witnesses were marshalled, duly sworn and placed under the rule, viz: P Nash, H. P. Brown, Thomas Scott, M. K. Toohey and P. E. DuBois; defendant's counsel stated that defendants had no witnesses. Mr. P. Nash called and testified on behalf of plaintiff and during his testimony plaintiff's counsel had the witness draw and testify from a sketch upon the blackboard, same representing the "New Tuscano Hotel." Mr. Cantwell had marked a five dollar silver certificate (corner torn off) numbered M97605810, sealed in an envelope, marked Plffs. Ex. No. 1 for Identification. Thomas Scott called by plaintiff and during his testimony Mr. Cantwell had marked one pint bottle about one-half full light liquor, Plffs. Ex. No. 2 for Identification. Mr. Cantwell offered for all purposes Plffs. Ex. No. 1,

ordered admitted and marked Plffs. Ex. No. 1. Mr. S. C. Dinsmore duly sworn and testified for plaintiff. Thereafter plaintiff's witnesses P. E. DuBois, H. P. Brown and M. K. Toohey were each called in turn and testified for plaintiff. Thereupon plaintiff rests. The defendants, A. Lazzari and J. Montelatici were each duly sworn and testified in their own behalf after which defendant rests. No further testimony [9] being offered and after argument by counsel for the respective parties the case was submitted. Thereupon and after hearing the instructions given by the Court the jury retired in charge of the Marshal to deliberate on the case and at 4:55 came into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. No. 5495. We, the jury in the above-entitled case, find the defendant, J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count. Dated this 25th day of November, 1922, H. B. Maxson, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. No. 5495. We, the jury in the above-entitled case, find the defendant A. Lazzari, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count. Dated this 25th day of November, 1922. H. B. Maxson, Foreman,"—and so they all say. IT IS OR-

DERED that these defendants appear Monday, December 1, 1922, at ten o'clock A. M., for sentence. Ordered that the jury be, and it is hereby excused until Monday, November 27, 1922, at ten o'clock A. M. Upon motion of Mr. Frame the bail of these defendants is hereby fixed at Two Thousand (\$2,000.00) Dollars cash for each.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—December 1, 1922—Judgment
Ordered as to Defendant A. Lazzari and Continuing Sentence as to Defendant J. Montelatici.**

Upon motion of Mr. James M. Frame, consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the time for passing sentence upon the defendant J. Montelatici be, and the same is hereby, continued to and until December 9th, 1922, at ten o'clock A. M. This being the time heretofore fixed for passing sentence upon the defendant A. Lazzari the Court pronounced judgment as follows, addressing the said defendant. In consideration of the law and the premises, IT IS HEREBY OR-

DERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of five (5) months from and after this date and that you pay to the United States a fine in the sum of Three Hundred Fifty (\$350.00) Dollars and that you stand committed in said county jail until the said fine together with the costs herein incurred are paid. [10]

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—December 9, 1922—Order Continuing Passing of Sentence.

This being the time heretofore appointed for passing sentence in this case, the defendants appeared with their attorney, Mr. James M. Frame and presented his motion for a new trial and a motion in arrest of judgment. Mr. C. A. Cantwell, Assistant United States Attorney, appeared for and on behalf of plaintiff. The motions were argued by counsel for the respective parties and by the Court taken under advisement and IT IS ORDERED that the time for passing sentence in this case upon the defendant J. Montelatici be and the same is hereby continued to and until January 13, 1923, at ten o'clock A. M.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—December 13, 1922—Order De-
nying Motion for New Trial.**

This being the time heretofore fixed for passing sentence upon the defendant J. Montelatici and he being now present in court with his attorney, Mr. James M. Frame; Mr. Frame presents and files his motion for a new trial upon which IT IS ORDERED that defendant's motion for a new trial be, and the same is hereby, denied, and the said defendant will be allowed to and including January 12th, 1923, within which to perfect and file his papers on appeal. [11]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—January 12, 1923—Judgment
Ordered as to Defendant J. Montelatici.**

This being the time heretofore fixed for passing sentence upon the defendant J. Montelatici, he appeared with his attorney Mr. M. M. Detch. Upon motion of Mr. Detch and upon the heretofore filed withdrawal of Messrs. Frame & Raffetto, IT IS ORDERED that the name of Mr. M. M. Detch be, and the same is hereby, entered as of record as attorney for the defendant in this case. Thereupon the Court pronounced judgment as follows, addressing the defendant J. Montelatici. In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of four (4) months from and after this date and that you stand committed in said county jail until the costs herein are paid by you. To this sentence Mr. Detch asked and was granted the benefit of an exception. Upon motion of Mr. Detch, IT IS ORDERED that the bond of this defendant be, and the same is hereby, fixed at Three *Thousand* (\$3,000.00) *cash*, or \$4,000.00 surety to act as a supersedeas bond upon appeal and to cover any order of this Court. IT IS FURTHER ORDERED THAT THE DEFENDANT HAVE FIFTEEN days from and after this date within which to furnish said bond and in the meantime the Two Thousand (\$2,000.00) Dollars cash bond will be surety for the filing of the required bond. [12]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

G. MONTELATICI and A. LAZZARI.

**Minutes of Court—February 3, 1923—Order that
Writ of Error Issue.**

Upon the filing by defendant's attorney, Mr. M. M. Detch, of his assignment of error, cost bond, supersedeas bond and petition for writ of error, IT IS ORDERED that a writ of error issue in this case.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—February 5, 1923—Order Con-
tinuing Hearing on Motion.**

Upon motion of Mr. M. M. Detch, attorney for these defendants, consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the hearing on the motion of defendant, J. Montelatici, to modify

the judgment on account of the inconsistency of the verdict be, and the same is hereby, continued to and until to-morrow at ten o'clock A. M. [13]

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—February 6, 1923—Order Denying Motion to Vacate Judgment.

These defendants appeared this day with their attorney, Mr. M. M. Detch, and their motion to vacate judgment was argued, submitted and ordered overruled. IT IS FURTHER ORDERED that the papers on appeal submitted to the Court on the 3d day of February, 1923, on behalf of the defendant J. Montelatici be and the same are hereby filed as of that date. IT IS FURTHER ORDERED that the said defendant, J. Montelatici be, and he is hereby, granted to and until February 26, 1923, within which to file his bill of exceptions. [14]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—February 26, 1923—Order Continuing Time to and Including March 24, 1923, to File Proposed Bill of Exceptions and Record on Appeal.

Upon stipulation by counsel for the respective parties, IT IS ORDERED that the defendant, J. Montelatici be, and he is hereby, allowed to and until March 10th, 1923, within which to file proposed bill of exceptions, and IT IS FURTHER ORDERED that defendant be, and he is hereby, allowed to and until March 24th, 1923, within which to file record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—March 23, 1923—Order Allow-
ing Bill of Exceptions.**

On motion of Mr. M. M. Detch, attorney for defendant J. Montelatici, and consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the bill of exceptions be, and the same is hereby, settled and allowed. [15]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

October Term, 1922.

Violation National Prohibition Act.

No. 5495.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

Judgment (A. Lazzari).

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, A. Lazzari, have been indicted by the Grand Jury, impaneled in and by this Court for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume,

fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by keeping intoxicating liquor for sale in that certain building situate at 246 Lake Street in the City of Reno, Nevada; said crime having been committed on the 3d day of May, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Five (5) Months from and after this date and pay to the United States a fine of Three Hundred Fifty (\$350.00) Dollars, and that you stand committed in said county jail until the fine and costs, taxed at \$63.40, are paid.

Dated and entered Dec. 1, 1922.

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy. [16]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ZARO,

Defendants.

Motion in Arrest of Judgment by J. Montelatici.

Comes now J. Montelatici, one of the defendants above named and moves the Court to arrest the judgment and that no judgment be rendered upon the verdict against him, finding him guilty of maintaining a nuisance by keeping for sale intoxicating liquors, upon the following grounds, to wit:

1.

That the verdict is insufficient to support a judgment.

2.

That said verdict is inconsistent and will not support a judgment in this: That upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, on the same date and upon the same transaction upon which a verdict of guilty of maintaining a nuisance, that is keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of

guilty of maintaining a nuisance rendered by the jury.

3.

That the count of the indictment charging the defendant with maintaining a nuisance, does not state facts sufficient [17] to constitute a public offense or any offense whatsoever, under the laws of the United States, and is not sufficient in law.

4.

That upon the whole record the judgment is erroneous and should not be rendered.

J. M. FRAME and
F. RAFFETTO,

Attorneys for the Defendant, J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Amatraddo Lazzaro, Defendants. Motion in Arrest of Judgment by J. Montelatici. Service admitted by copy this 5th day of December, 1922. George Springmeyer, U. S. District Attorney. J. M. Frame and F. Raffetto, Attorneys for Defendants. Filed Dec. 6, 1922. E. O. Patterson, Clerk. [18]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ZARO,

Defendants.

Motion of J. Montelatici for a New Trial.

Comes now J. Montelatici, one of the defendants above named, and moves the Court to set aside the verdict of the jury heretofore rendered against him in the above-styled cause, finding him guilty of maintaining a nuisance by keeping intoxicating liquors for sale upon the following grounds, to wit:

1.

That said verdict is contrary to law.

2.

That said verdict is contrary to the evidence.

3.

That said verdict is contrary to the law and the evidence.

4.

That said verdict is inconsistent and will not support a judgment in this: That upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, on the same date and upon the same transaction upon

which a verdict of guilty [19] of maintaining a nuisance, that is keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of guilty of maintaining a nuisance rendered by the jury.

5.

Misdirections of the jury as to matters of law.

6.

Error of the Court in admitting and rejecting testimony.

7.

That the evidence is insufficient to support the verdict.

J. M. FRAME and
F. RAFFETTO,

Attorneys for Defendant J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Amatraddo Lazzaro, Defendants. Motion of J. Montelatici for a New Trial. Service admitted by copy this 5th day of December, 1922. George Springmeyer, U. S. District Attorney. J. M. Frame and F. Raffetto, Attorneys for Defendants. Filed Dec. 6, 1922. E. O. Patterson, Clerk. [20]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZZARO,

Defendants.

Withdrawal of Counsel.

Come now J. M. Frame and F. Raffetto and hereby withdraw as attorneys of record in the above entitled cause.

J. M. FRAME.

F. RAFFETTO.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Amatraddo Lazzaro, Defendants. Withdrawal. Filed Jany. 10, 1923. E. O. Patterson, Clerk. [21]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

October Term, 1922.

No. 5495.

Violation National Prohibition Act.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

Judgment (J. Montelatici).

This being the time heretofore appointed for passing sentence in this case the Court pronounced judgment as follows, addressing the defendant:

You, J. Montelatici, have been indicted by the Grand Jury, impaneled in and by this Court for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by keeping intoxicating liquor for sale in that certain building situate at 246 Lake Street in the City of Reno, Nevada; said crime having been committed on the 3d day of May, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of

this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the third count of the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ORDERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Four (4) Months from and after this date, and that you stand committed in said county jail until the costs, taxed at \$67.60, are paid.

Dated and entered January 12, 1923.

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy. [22]

In the District Court of the United States for the
District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
G. MONTELATACI and A. LAZARRI,
Defendants.

Motion to Vacate Judgment.

Comes now the defendant G. Montelataci and moves the Court to vacate the said judgment and sentence heretofore made and entered in the above-entitled cause upon the ground that the said verdict is contrary to the law and the evidence, in this: That the said verdict is inconsistent and will not support a judgment, in this, that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled action, the jury returned a verdict of not guilty as to this defendant for the sale of liquor, and the possession of liquor on the same date, and upon the same transaction, upon which verdict of maintaining a nuisance, that of keeping intoxicating liquor for sale was based; all of which is inconsistent with the verdict of guilty of maintaining a nuisance as rendered by the jury.

MILTON M. DETCH,

Attorney for the Defendant, G. Montelataci.

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatchi and A. Lazzari, Defendants. Motion to Vacate Judgment. Filed Feb. 3, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy. Milton M. Detch, Attorney at Law, Reno, Nevada, Attorney for G. Montelatchi. [23]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

_____ ,

Defendants.

Assignments of Error.

Comes now J. Montelataci, one of the defendants herein, and files the following assignments of error, which he will rely upon in the presentation of the writ of error, in the above-entitled matter from the judgment made and entered by this Honorable Court on this 12th day of January, 1923.

I.

That the United States District Court erred in denying defendant's motion for a new trial, for the reasons herein stated.

II.

That the verdict is insufficient to support the judgment, and that this is manifest from the record, as hereinafter stated.

III.

That the verdict is contrary to the law, as hereinafter stated.

IV.

That the verdict is contrary to the evidence as hereinafter stated.

V.

That the verdict is inconsistent, and will not sup-

port a judgment; in this: that upon the same trial and as part of the verdict rendered by the jury in the above-entitled case, [24] the jury returned a verdict of not guilty, as to this defendant for the sale of liquor, and to the possession of liquor on the same date and upon the same transaction, found a verdict of guilty of maintaining a nuisance, that of keeping intoxicating liquors for sale; all of which is inconsistent with the verdict of maintaining a nuisance, rendered by the jury.

VI.

That the counts of the indictment with reference to maintaining a nuisance does not state facts sufficient to constitute a public nuisance, or any nuisance whatever under the laws of the United States.

VII.

That the evidence is insufficient to support the verdict, for the reasons stated in paragraph six.

VIII.

That the said verdict is contrary to the law and the evidence, in this: that the said verdict is inconsistent and will not support a judgment, in this: that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled action, the jury returned a verdict of not guilty as to this defendant for the sale of liquor, and the possession of liquor on the same date, and upon the same transaction, upon which verdict of maintaining a nuisance, that of keeping intoxicating liquor for sale was based; all of which is inconsistent with the verdict of guilty of maintaining a nuisance^u as rendered by the jury.

IX.

That there is not sufficient evidence upon which the jury can base a verdict of guilty of a nuisance, for the reason that it is not shown by the evidence that defendant is guilty of possession or sale, or that he or his agents had knowledge, or reason to believe [25] that any property or premises owned, used or controlled by him, or otherwise, was so occupied, used, or maintained as a nuisance, as defined by the National Prohibition Act.

X.

That there is manifest error in this: that the evidence fails to show that the said defendant or his agent or agents or anyone under his control, made more than one sale or any sale at all.

XI.

That the Court erred in giving to the jury certain instructions, over the objections and exceptions of defendant, all of which is patent and manifest in the record, and transcript of testimony herein.

XII.

That upon the whole record the judgment is erroneous.

XIII.

That the Court erred in admitting certain testimony duly excepted to, as appears from the record.

XIV.

That the verdict of guilty of a nuisance found against this defendant, is absolutely and wholly inconsistent with the verdict, in favor of and against this defendant and his codefendants.

WHEREFORE, this plaintiff in error prays, that the judgment aforesaid be reversed, and the same remanded for such other and further proceedings as may be proper in the premises.

Respectfully submitted,

MILTON M. DETCH,

Attorney for the Defendant. [26]

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Assignments of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney at Law, 307 Nev. State Life Bldg., Reno, Nevada. [27]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge
of the said District Court:

And now comes J. Montelatici, one of the defendants herein, by Milton M. Detch, Esq., his attorney, and says that on the 12th day of January, 1923, this Court entered judgment herein against said

defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defendant, all of which will more fully appear from the assignment of errors, which is filed, or about to be filed, with this petition.

WHEREFORE, defendant prays that a writ of error may issue in his behalf, out of the United States Circuit Court of Appeals, for the Ninth District, for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

G. MONTELATICI,

Defendant.

By MILTON M. DETCH,

Attorney for Defendant.

[Endorsed]: No.5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Petition for Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney at Law, Gazette Building, Reno, Nevada. [28]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Order Allowing Writ of Error.

Let a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Nevada, as prayed for in the petition of the said J. Montelatici, and that the citation be issued to the defendant in error.

And it now appearing that a citation has been served in the above cause, it is now

ORDERED that a writ of error, allowed as above stated, operate as a supersedeas and the defendant be admitted to bail upon furnishing a good and sufficient bond in the penal sum of Four Thousand Dollars, conditioned according to law.

Dated Feb. 3, 1923.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 5495. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Order. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M.

Detch, Esq., Attorney at Law, Gazette Building,
Reno, Nevada. [29]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

Bail Bond on Writ of Error.

We, J. Montelatici, as principal, residing at Reno, Washoe County, State of Nevada, and J. L. Semenza and L. Devincenzi, as sureties, residing at Reno, County of Washoe, State of Nevada, acknowledge ourselves to be jointly and severally indebted to the United States of America, in the sum of \$4,000.00, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenants, upon this condition; that if the said G. Montelatici, the defendant upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals, for the Ninth Circuit, and is now pending, shall be and appear at the District Court of the United States for the District of Nevada, upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate, showing the disposition thereof by the said Court of Appeals, or within five days there-

after, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and effect. [30]

IN WITNESS WHEREOF, the said G. Montelatici has hereunto set his hand and seal, as principal, and the said J. L. Semenza and L. Devincenzi, as sureties, have hereunto set their hands and seals, all done this 31st day of January, 1923.

G. MONTELATICI. (Seal)

J. L. SEMENZA. (Seal)

L. DEVINCENZI. (Seal)

State of Nevada,
County of Washoe,—ss.

J. L. Semenza and L. Devincenzi, sureties on the annexed and foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says, that he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of \$4,000 over and above all his just debts and liabilities, and property not exempt from execution.

J. L. SEMENZA.

L. DEVINCENZI.

Subscribed and sworn to before me this 31st day of January, 1923.

[Seal]

GEORGE S. HALL,
Notary Public.

Taken and approved this 31 day of January, 1923.

GEORGE SPRINGMEYER,
United States Attorney.

By _____,
Assistant United States Attorney.

E. S. FARRINGTON,
U. S. District Judge. [31]

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Bail Bond on Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendants. Gazette Building, Reno, Nevada. [32]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, G. Montelatici, as principal, and J. L. Semenza and L. Devincenzi, as sureties, of the County of Washoe, State of Nevada, are held and

firmly bound unto the United States of America, in the sum of \$500.00 lawful money of the United States; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 31st day of January, 1923.

WHEREAS, the above G. Montelatici has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment of the District Court of the District of Nevada, in the above-entitled cause:

NOW THEREFORE, the condition of the obligation is such that if the above-named G. Montelatici shall prosecute his said appeal to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said G. Montelatici, has hereunto set his hand and seal, as principal, and the said J. L. Semenza and L. Devencenzi, as sureties, have hereunto set [33] their hands and seals, all done this 31st day of January, 1923.

G. MONTELATICI. (Seal)

J. L. SEMENZA. (Seal)

L. DEVENCENZI. (Seal)

State of Nevada,
County of Washoe,—ss.

J. L. Semenza and L. Devencenzi, sureties on the annexed and foregoing undertaking, being first duly sworn, each for himself and not one for the

other, deposes and says, that he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of \$1000 over and above all his just debts and liabilities, and property not exempt from execution.

J. L. SEMENZA.

L. DEVENCENZI.

Subscribed and sworn to before me this 31st day of January, 1923.

[Seal]

GEORGE S. HALL,

Notary Public.

Taken and approved this 31 day of January, 1923.

GEORGE SPRINGMEYER,

United States Attorney.

By _____,

Assistant United States Attorney.

E. S. FARRINGTON,

U. S. District Judge. [34]

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazzari, Defendants. Cost Bond on Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendants. Gazette Building, Reno, Nevada. [35]

In the District Court of the United States, in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZZARI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill of
Exceptions.**

It is hereby stipulated and agreed by and between counsel for the respective parties that the defendant, G. Montelatici, shall have up to and including the 10th day of March, A. D. 1923, for filing proposed bill of exceptions and that the said defendant shall have up to and including the 24th day of March, A. D. 1923, to file Record in the Circuit Court of Appeals and to do such other and further things as may be necessary to effect his said appeal.

GEORGE SPRINGMEYER,

United States Attorney.

By CHAS. A. CANTWELL,

Assistant.

MILTON M. DETCH,

Attorney for Defendant, G. Montelatici.

Dated this 24th day of February, A. D. 1923.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. G. Mon-

telatici and A. Lazzari. Stipulation. Filed Feb. 26, 1923. E. O. Patterson, Clerk. [36]

In the District Court of the United States, in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZARRI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill of
Exceptions.**

IT IS HEREBY STIPULATED AND AGREED
by and between counsel for the respective parties,
that the defendant G. Montelatici shall have up to
and including the 20th day of March, 1923, in which
to prepare and file proposed bill of exceptions in
the above-entitled cause, and that the said defend-
ant shall have up to and including the first day of
April, 1923, in which to file his transcript of record
in the Circuit Court of Appeals, and to do such
further and other things to perfect said writ of
error, as he may be advised.

Dated at Reno, Nevada, this 8th day of March,
1923.

GEORGE SPRINGMEYER,

United States Attorney.

By CHAS. A. CANTWELL,

Assistant United States Attorney.

MILTON M. DETCH,

Attorney for Defendant.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Stipulation. Filed March 10, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendant G. Montelatici. Gazette Building, Reno, Nevada. [37]

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and ARMATRADDO LAZ-
ARRI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill
of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties, that the defendant J. Montelatici shall have up to and including the 25th day of March, 1923, in which to prepare and file proposed bill of exceptions in the above-entitled cause, and that the said defendant shall have up to and including the first day of April, 1923, in which to file his transcript of record in the Circuit Court of Appeals, and to do such further and other things to perfect said writ of errors, as he may be advised.

Dated at Reno, Nevada, this 20th day of March, 1923.

GEORGE SPRINGMEYER,
United States Attorney.
By CHAS. A. CANTWELL,
Assistant United States Attorney.
MILTON M. DETCH,
Attorney for Defendant.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazarri, Defendants. Stipulation. Filed March 21, 1923. E. O. Patterson, Clerk. Milton M. Detch, Attorney for Defendant J. Montelatici. Gazette Building, Reno, Nev. [38]

In the District Court of the United States in and for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. MONTELATICI and ARMATRADDO LAZARRI,
Defendants.

Praeipce for Transcript of Record.

To E. O. Patterson, Clerk of the United States District Court, Carson City, Nevada.

Request is made on you, that you have prepared

all papers and records in the above-entitled case, as follows:

1. Indictment.
2. Verdict of the jury.
3. Motion in arrest of judgment, rulings thereon and exceptions thereto.
4. Motion for a new trial, rulings thereon and exceptions thereto.
5. Judgment and sentence.
- 5½. Motion to reverse judgment.
6. Petition for writ of error.
7. Order allowing writ of error.
8. Writ of error.
9. Assignments of error.
10. Citation.
11. Bill of exceptions.
12. All stipulations extending time for preparing motion for a new trial, assignment of errors and bill of exceptions.
13. Withdrawal of Messrs. Frame & Rafetto, attorney for J. Montelatici and substitution of Milton M. Detch, Esq., as attorney for the defendant.
14. All minutes of Clerk of Court showing the Court's ruling upon all motions, rulings and exceptions.
15. Supersedeas bond. [39]
16. Cost bond.

MILTON M. DETCH,

Attorney for the Defendant J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada.

United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazzari, Defendants. Prae-
cipe for Transcript of Record. Milton M. Detch,
Esq., Attorney for Defendant, J. Montelatici. Ga-
zette Building, Reno, Nevada. Filed March 23, 1923.
E. O. Patterson, Clerk. By O. E. Benham, Deputy.
[40]

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and ARMATRADDO LAZ-
ARRI,

Defendants.

Bill of Exceptions for Defendant J. Montelatici.

BE IT REMEMBERED that this cause came on
to be heard on the 25th day of November, 1922, be-
fore Honorable E. S. Farrington, Judge of said
Court, and a jury therein, duly sworn to try said
cause; and the following testimony was offered and
presented on behalf of the plaintiff and defendant.

Testimony of P. Nash, for the Government.

P. NASH, called and sworn as a witness for the
plaintiff, testified as follows:

Direct Examination by Mr. CANTWELL.

Am a Federal Officer and National prohibition

(Testimony of P. Nash.)

agent; familiar with the premises known as the New Toscano, Reno, Nevada; situate at 246 Lake Street; was on those premises May 3d, 1922; agents DuBois and Brown went in the premises with me; agent Scott was already in the premises; found him there when I arrived; went directly to the east end of the bar; noticed Scott leaning against end of bar; noticed Lazarri, one of the defendants, just going around the corner toward the stairway; in his right hand he held a bunch of keys; in his left hand he had four glasses, two whiskey glasses and two wine glasses; saw Scott before that evening, about ten minutes before; when I entered bar, saw Lazarri going towards the stairs; I stopped Lazarri and took keys from him; went upstairs [41] and endeavored to find supply of liquor; I did not find any; then went behind bar with agent Brown, and found cash register open, and took therefrom marked five dollar silver certificate; it was in sight there in the cash register; saw that before, in office of Prohibition Director, about five or ten minutes before; it had been marked by myself by tearing off one corner; Scott had no other money on him at that time; when Mr. Scott was found there in the New Toscano, ten or fifteen minutes after that, there was a search made of his person by agent Brown; it was made in my presence; saw some money taken out by agent Dubois; defendant Montelatici was there that evening behind the bar; I identify this as the identical bill which was given by us to

(Testimony of P. Nash.)

agent Scott that night, and later found in the cash register.

Cross-examination by Mr. FRAME.

Made a search of the premises and did not find any liquor on the premises except on Mr. Scott; that was a bottle that Mr. Scott had in his pocket; when I went in saw Lazarri there; he was possibly six feet from the end of the bar; Mr. Montelatici at that time was behind the bar; I saw intoxicated persons in the place that evening; saw intoxicated persons about this place at other times; that was a frequent occurrence.

Testimony of Thomas Scott, for the Government.

Mr. THOMAS SCOTT, called as a witness for plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. CANTWELL.

Was a Federal Prohibition Officer in the month of May of this year; I am familiar with the premises known as the New Toscano Hotel on Lake Street in Reno; was in those premises on the 3d day of May 1922, the first time at 8.50 P. M.; Lazarri was in there when I went in; I bought one drink from him, and paid fifty cents for it; he went upstairs some place, he went [42] out of the bar-room, went upstairs with the glass in his hand; came down in a moment and gave me the glass of whiskey; I consumed that drink there on the premises; he put the money in the cash register; then I left there and went over to Captain Don-

(Testimony of Thomas Scott.)

nelly's office; I was searched there by agents Dubois and Brown; all of my possessions were taken from me, money and one thing and another; I was given a five dollar bill, and was informed it was marked money and told to return to the New Toscano and purchase a bottle of whiskey, which I did; I then returned to the Toscano; immediately after leaving Captain Donnelly's office; had no liquor on me at that time; I had no money on me other than this marked five dollar bill; when I entered the Toscano the second time that evening, both of these defendants were there; they were back of the bar; at that time I bought a drink and a small beer bottle of whiskey from Lazarri; when I went in there that second time, I told him to give me a little shot, and also a bottle; he got a little bottle from a box near the end of the bar, the east end of the bar, from a box of bottles, he went upstairs; he handed me the drink and the bottle; I put the drink into my mouth and went into the toilet and empties it into a small vial; preserved that as evidence, as I did also the bottle; I paid Lazarri two fifty for the drink and bottle, and the money was put in the cash register; paid him with the marked five dollar bill, and received two dollars and fifty cents in change; he rang up the two dollars and fifty cents on the cash register; I remained there for a little while after I had bought the bottle, and then I asked him for another drink; he got same glasses—I don't know how many—but he had his hand full of glasses on his way to go upstairs, when

(Testimony of Thomas Scott.)

the door opened and the other officers entered. Then Mr. DuBois and Mr. Brown came over and searched me and found the bottle [43] in my pocket; I also had this little vial but they didn't locate it; the other bottle I had in my trousers pocket; they searched me again when I returned to the office, which I did immediately, and took the two and a half; that was found in my pocket at the office; the two and a half found in my pocket at the office was the two and a half I received from Lazarri, the change for the five dollar bill; I turned the small vial over to Captain Donnelly, on the same night, in the office; he was in the office when I returned; I returned prior to the other agents; while I was there I saw Mr. Nash go to the cash register, which was open; when he pushed the button, the drawer flew open, and he hadn't closed the drawer when the other agents came in; I saw Mr. Nash taking a bill from the cash register; I was in those premises before with agent McNeill, on April 10th and purchased four drinks; one for McNeill, one for myself, one for Tony Lazarri and one for a man by the name of F. McAvoy, who happened to be in there, and also a small flask, for which I paid a dollar and a half, and two dollars for the four drinks; the liquor was brought from somewhere in the back room and the barroom, and served in a little office in front of the barroom; it was brought in a lemonade glass and from the lemonade glass, poured into the whiskey glasses; this flask was purchased at that time; I was in there

(Testimony of Thomas Scott.)

again on April 29th at 11:15 A. M. I went in alone; I was sent down there by the Director to see if they was still selling it in the New Toscano; I went in there and was taken into the little room and purchased one drink of corn whiskey from Montelatici, one of the defendants; I saw other transactions while I was in there; I saw two men standing at the bar; I didn't hear them asking for anything, but just a moment later I was there they was handed a small bottle, beer bottle; they paid five dollars for the beer bottle and two and [44] half was rung up in the cash register, and they got the change; I purchased and drank; it was corn whiskey; on the night we raided the place, the night I *bot* the bottle, there was a fellow standing at the bar very drunk; he got into an argument about his change; he bought something there and wanted his change, and he was very much intoxicated; and there was possibly twenty-five men in there, some of them under the influence of liquor; every time I have been there the same conditions prevail, possibly not so many men; Plaintiff's Exhibit No. 2 for identification is the bottle I purchased that night, with my initials on it; on that night of May 3d; that is the bottle that was taken from my pocket by the Prohibition Officers that night.

Cross-examination of Witness SCOTT by Mr. FRAME.

Lived in Nevada; known the defendant about a month before the 3d of May; Mr. McNeill made me

(Testimony of Thomas Scott.)

acquainted with them; he was a Federal Prohibition Agent and I was taken in there and made acquainted with Mr. Lazarri; he took me in there and he introduced me to Mr. Lazarri; I didn't tell him who I was, or I could not have *bot* the liquor; my occupation was a Federal Prohibition Agent; I was working under cover at that time; I did not represent myself as a railroad man, nor represented to Mr. Lazarri that I was a railroad man; it is a fact that on Commercial Row and on Lake Street, in that vicinity, there at all times, almost day and night, great numbers of people congregated, and that you may go there on the street along two blocks of that place, most any time of the day and see persons that are intoxicated, or more or less intoxicated; it is nothing unusual for persons who are intoxicated to go into places when in that condition, and come out of places; on this occasion I was first searched to ascertain what money I had, in the Prohibition Director's office, and at that time I was given a five dollar [45] bill, and that was the only money I had; I returned to the Prohibition Director's Office and was again searched; I had two fifty in silver; this search was made on May 3d, between nine-thirty and ten o'clock at night; from there I went directly to the Toscano Hotel from the Prohibition Director's office; when I entered the New Toscano Hotel there was between twenty and twenty-five men in there; I didn't know any of them, they was mostly Italians; when I went into the place Lazarri was behind the bar and

(Testimony of Thomas Scott.)

Montelatici was in front of the bar near the end; shortly after I went in there, a moment after I went in there, Montelaticu went behind the bar; he was in front of the bar when I first entered; he went in back of the bar while I was in there; I didn't see him sit down at any table; I saw him behind the bar; when I purchased a drink Lazarri went upstairs and Montelatici took his place back of the bar; the first thing I did there, I walked over in a leisurely way and asked for a drink from Lazarri; Lazarri was back of the bar, and at that time Montelatici was in front of the bar; never had any conversation with Mr. Montelatici at that time; when I went in I gave him a bill, five dollars, and I was returned two dollars and fifty cents, which I presume paid for the drink and the bottle, there was no contract or agreement made; I simply *bot* it and gave him the five dollar bill; I told him when I went in that I wanted a small bottle of booze; I did not tell him about what price; prior to going into that place I hadn't had a drink; I had a drink at ten minutes to nine, I was sent there by the Director to see if I could purchase liquor there; when I went in there I didn't want a drink and didn't drink the drink; I saved it in the little vial; after I had made this purchase I waited a few moments, waiting for the other agents to come in; then I asked Lazarri for another drink; he got some glasses from back [46] of the bar—just how many I don't know; but he got a handful and he immediately started for the back part of the

(Testimony of Thomas Scott.)

barroom when the front door opened and the other agents entered; I was searched and requested to leave the building; he told me to get out after he got the bottle; no other liquor was found, to my knowledge, except what I had in my pocket; I was still there when Mr. Nash went to the cash register; the drawer of the cash register was open and I see Mr. Nash taking a bill from the cash register; he called the two defendants over; just about that time I left; the cash register was open, the drawer was open; it was open when Mr. Nash went behind the bar.

Redirect Examination by Mr. CANTWELL of Witness SCOTT.

I have been for some time working as a Federal Prohibition agent; since February 20th; and in a number of instances made purchases of what I call whiskey; and in many of those cases there has been a subsequent analysis made by Professor Dinsmore of those same liquids which I classed as whiskey, and my familiarity with the taste of liquors and from my familiarity with the testimony given by Professor Dinsmore as to what chemical analysis of those same liquors shows by way of alcoholic content, I am able to state whether this liquid which I purchased at various times and which I call whiskey, contained more than one half of one per cent of alcohol by volume.

We now offer in evidence Plaintiff's Exhibit No. 1, on the foundation laid in the testimony of agents Nash and Brown.

Testimony of S. C. Dinsmore, for the Government.

Mr. S. C. DINSMORE, called as a witness by plaintiff, was sworn and testified as follows:

Direct Examination by Mr. CANTWELL.

Am in charge of the State Food and Drug Laboratory; I am a chemist. [47]

Q. Will you look at the bottle, Exhibit No. 2, which is immediately in front of you, Professor Dinsmore, and state whether or not that has ever been in your possession? A. It has.

Q. Do you remember how it came in your possession?

A. It was handed to me by one of the officers, brought to the laboratory by Mr. DuBois.

Q. On what day? A. On May 4th.

Q. Do you remember its condition at that time, as to whether it was of the same content as at present. A. It is, yes; the bottle was sealed.

Q. Did it contain more in the way of contents then than it now has?

A. Yes, a portion was removed.

Q. Did you make any analysis of the contents of that particular bottle delivered to you that day?

A. I did.

Q. To determine the alcoholic content?

A. To determine the alcoholic content.

Q. By volume? A. Yes, sir.

Q. And what did you determine to be the alcoholic content of that liquor?

(Testimony of S. C. Dinsmore.)

A. I found that it contained 51.77 per cent alcohol.

Q. By volume? A. By volume.

Q. Is that a liquor that bears any name about this country?

A. I classed it as corn whiskey.

Q. Did you class it as such a liquor as could be used for beverage purposes? A. Yes, sir.

Testimony of P. E. DuBois, for the Government.

Mr. P. E. DUBOIS, called as a witness for plaintiff, having been previously sworn, testified as follows:

Direct Examination by Mr. CANTWELL.

I am a Federal Prohibition Agent, working in that capacity on the 3d day of May of this year; I was around the premises [48] known as the New Toscana on the evening of that day; I entered the premises with Nash and Brown; when I entered I saw Prohibition Agent Scott in there; I searched Mr. Scott there in that barroom that evening; immediately after I entered, I took a small bottle containing liquor from him; I sealed it soon after taking it from him and labeled it; kept it until the next day; turned it over to the State Chemist; Plaintiff's Exhibit No. 2 for Identification is the bottle I have been testifying about.

Mr. CANTWELL.—I now offer this bottle and its contents in evidence on the foundation laid by the testimony given.

Mr. FRAME.—No objection.

(Testimony of P. E. DuBois.)

(The bottle is admitted in evidence and marked Plaintiff's Exhibit No. 2.)

I made further search of the premises that evening; I went upstairs, and I searched in three or four rooms upstairs; that was open; I did not discover anything in the way of liquor there; I saw a piece of currency, a bill taken from that building that evening, by Mr. Nash, from the cash register; the cash register was open; had seen that bill before, in Captain Donnelley's office, a few minutes before; the number was taken on it for identification, and it was turned over to agent Scott; to use that at the New Toscano to get evidence, and there was no money left until this five-dollar bill was given him; We left the Prohibition Offices immediately, when Scott left, and I followed him closely; kept him in sight at all times; from the time he left the Prohibition Office until he entered the New Toscano, he was not out of my sight at any time; Plaintiff's Exhibit No. 1 is the piece of money in question; the corner off, and the serial number was torn off; had been in that place prior to the 3d day of May and after these defendants had gone into the place, I was in there during the month of December; [49] Mr. Nash, Mr. Brown and agent Sheehan were there at that time; they were all prohibition agents; it was on the 12th of December, 1921, I was there; I made a search of those premises at that time; agent Sheehan and I went into the cellar, and we found a quart bottle about two-thirds full, in the cellar near where the cigars were kept; it appeared

(Testimony of P. E. DuBois.)

to be corn whiskey; I tested it; Mr. Montelatici was there at that time; he was in the barroom.

Cross-examination by Mr. FRAME.

Found a bottle of liquor, quart bottle partly full, containing a quantity of liquor, December 21, 1921, at 2:00 P. M. that was shortly after Mr. Montelatici and this defendant took possession of the premises; this was under a lot of cigar boxes in the basement, almost directly under the barroom; I recall that it was shown upon the hearing before the United States Commissioner that these men never had any knowledge of the presence of that bottle in the place it was at, and that they were discharged on the ground of the insufficiency of the evidence; we all entered the place together on May 3d; almost immediately the door was opened and Nash, Brown and I went in; Nash and Brown jumped over the bar, and after Brown had jumped over he ran to the east end, and I had gone around the east end, and we went to where Scott was standing, and we searched Scott; Plaintiff's Exhibit No. 2 is the bottle. In our search of the premises I did not find any liquor stored there at that time; the only liquor I saw there was what Scott had in his pocket.

Testimony of H. P. Brown, for the Government.

Direct Examination of the Witness H. P. BROWN,
by Mr. CANTWELL.

Witness called and sworn and testified as follows:

(Testimony of H. P. Brown.)

I am a Federal Prohibition Agent; have been for some time; was a Federal Prohibition Agent on December 12, 1921; I was in the premises of those defendants, called the Toscano, on [50] that day; Mr. Nash and Mr. Brown and Mr. Sheehan went in there; I made a search of the premises at that time and in a little room off from the barroom we found a quart bottle, a beer bottle, about half full of liquor, in a fur overcoat hanging on the wall; did not taste the contents of that bottle; just merely smelled it; it had an alcoholic smell; this was in a coat hanging in that little room at the end of the barroom; when I was in there on December 12, 1921, I saw Mr. Montelatici; he was behind the bar; we jumped over the bar, and he was behind the bar; I was also in the premises on May 3d of this year, around nine o'clock in the evening; we entered the house with Mr. DuBois and Mr. Nash; Mr. Scott was in there alone; he was standing at the lower end of the bar; both of the defendants were in there at the time I entered; Mr. Montelatici was behind the bar and Lazarri was on his way up stairs with two whiskey glasses and two wine glasses and a bunch of keys in his hand; then Mr. Nash and I jumped over the bar; we made a kind of a little search and I walked back to Mr. Scott, Mr. DuBois was there by Mr. Scott, and I held Mr. Scott while Mr. DuBois made the search; Mr. DuBois pulled out a bottle out of Mr. Scott's pocket; Mr. Nash and I went upstairs and searched a couple of rooms up there at the head

(Testimony of H. P. Brown.)

of the stairs; I did not discover any liquor on the premises at all that night.

Cross-examination of Witness BROWN by Mr.
FRAME.

The only liquor that I found or saw then on that occasion was in the possession of Mr. Scott and taken from his pocket; there was one bottle taken from Mr. Scott; he made resistance to being searched at that time; he actually kicked and attempted to prevent me from searching him, and in that search I didn't find anything; but Mr. DuBois pulled a bottle out of his pocket.

Testimony of A. Lazzari, for Defendants.

Mr. A. LAZARRI, one of the defendants, being called as a witness, after being duly sworn, testified as follows:

Direct Examination by Mr. FRAME. [51]

Q. Your name is A. Lazzari? A. Yes.

Q. How long have you lived in this country, Mr. Lazzari? A. About thirteen years.

Q. And where? A. Mostly in Reno and Yerington.

Q. What has been your occupation?

A. Used before come dry I tend bar for Frank Rosachi down in Yerington, and after that in the army.

Q. How long were you in the army?

A. Twenty months; I was in the Second Division, Ninth Infantry.

Q. That was in the war, was it?

(Testimony of A. Lazarri.)

A. War-time, yes.

Q. And where did you see any service at the front?

A. On B 7, front line, fifteen from the fire line.

Q. Were you wounded?

A. I was wounded both times.

Q. Where did you enlist or go from to the army?

A. I go from Yerington; I go to Camp Lewis, and from Camp Lewis to New York, and from New York to France.

Q. You know this man Thomas Scott?

A. Yes, sir.

Q. How long have you known him?

A. I have known him for seven months, maybe more than that.

Q. When you first knew him how did you know him?

A. He came over there to buy some cigars and some drinks, and eat once in a while.

Q. What kind of drinks? A. Soft drinks.

Q. What did he represent himself to be; how did he introduce himself to you?

A. I don't know, he came down over there.

Q. Did he tell you what he worked at or what he did?

A. He said he was engineer on the railroad, a railroad man.

Q. Now, you have heard his testimony that you sold liquor on the 3d day of May last, and that you sold some drinks on other occasions? A. Yes.

(Testimony of A. Lazarri.)

Q. I will ask you to state if you ever sold Mr. Scott any intoxicating liquors?

A. I never sold him any liquor at all.

Q. I will ask you to state if you ever sold Mr. Scott any intoxicating liquor.

A. I never sold him any liquor at all.

Q. Did you deliver this bottle that was introduced in evidence as Plaintiff's—

A. No, I don't know this bottle at all.

Q. Do you recall Mr. Scott being in your place at that time; do you remember of him being in the place at that time?

A. Oh, yes; he was there.

Q. Did he buy something from you? A. Yes.

Q. Did he give you a bill?

A. He gave me a five-dollar bill and I change it, and he take a glass of beer, and I give him four dollars and ninety cents back.

Q. And that is the time you came in possession of that bill, is it?

A. Yes, that is all I sold him, and it is legal for me.

Q. Did Mr. Montelatici have anything to do with that transaction?

A. Mr. Montelatici outside the bar playing cards and a man come in to the bar and ask for a glass of milk, and he go behind the bar himself.

Q. Did Mr. Montelatici have anything to do with your transaction with Mr. Scott? A. No, sir.

Q. He didn't participate in it in any way?

A. No, sir; he never have anything to do with it.

Testimony of J. Montelatici, for Defendants.

Mr. J. MONTELATICI, one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. FRAME. [53]

Q. Your name is J. Montelatici?

A. G. Montelatici.

Q. You have heard Mr. Scott's testimony about buying a bottle of liquor in the New Toscano, a bottle of whiskey shown here?

A. I see Mr. Scott down there; I no see before.

Q. Did you see Mr. Lazarri deliver a bottle of whiskey, corn whiskey to Mr. Scott?

A. I no see nothing at all.

Q. Did you ever have knowledge of any such transaction? A. No, sir.

Q. Did you ever sell any intoxicating liquor of any kind to Mr. Scott? A. No, sir.

Q. You heard some testimony about an overcoat and a bottle, I will ask you to state to the jury whose overcoat that was.

A. It was a Mr. Laventino; he came down there to my place and it is pretty cold and snow, and he says, "I want to hand up my coat in the office"; I say, "All right"; I don't know nothing about it. And that time, about five o'clock or ten minutes, he jump back of the bar and go through that coat.

Q. Did you know anything about the bottle?

A. I don't know anything about it, no.

Q. Referring to a bottle down in the basement

(Testimony of J. Montelatici.)

there, I will ask you what the fact is about that, a bottle that was found under some cigar boxes in the basement a short time after you went to the place?

A. Yes, he say he find it down there; I don't know; I have that place about a month before.

Q. Did you know anything about it?

A. I don't know nothing about it.

Q. Did it belong to you? A. No, no.

Q. That was found under some boxes in the basement, I understand. [54]

A. That is all, find some bottle around there.

Cross-examination by Mr. CANTWELL.

Q. When did you buy into that place;—do you remember what day, Mr. Montelatici? A. Yes, sir.

Q. What day, please?

A. September 13th, 1921.

Q. Ever since that day you have been one of the owners of the place? A. Yes, sir.

Q. And Mr. Lazarri, your partner, has been in there all this same time? A. Same time.

Q. And you still own the place? A. Yes, sir.

Q. And still run it? A. Yes, sir.

Redirect Examination by Mr. FRAME.

Q. Mr. Montelatici, has anyone since you have been there, sold or disposed of intoxicating liquors in that place to your knowledge? A. No, sir.

Q. Have you ever given your consent, or knew that intoxicating liquors were disposed of in that place since you have been proprietor? A. No, sir.

(Testimony of J. Montelatici.)

Recross by Mr. CANTWELL.

Q. You and Mr. Lazarri have attended to the bar in your place all the time since you have owned it, have you not?

A. I no work back of the bar; sometime, you know, when he want to take a little fresh air, I get behind the bar.

Q. Sometimes you work behind the bar for a few minutes? A. Just a few minutes, not much.

Q. Have you hired bartenders there?

A. Yes, I got a bartender.

Q. And this is just a soft-drink place, is it?

A. My son tend bar there.

Q. Is he the only bartender that has worked there? [55] A. For me, yes.

Q. And Mr. Lazzari has tended bar part of the time, has he? A. Tend bar in the night-time.

Q. And your son in the daytime? A. Yes.

Q. And sometimes you go on a few minutes to let either one or the other off for a while.

A. Yes, for fresh air.

Q. You have rooms upstairs at your place have you? A. Yes, sir.

Q. You rent those rooms out to people?

A. Hotel room; I got hotel room there and soft-drink parlor.

Q. How many rooms upstairs?

A. About twenty-six.

Mr. FRAME.—Q. You also feed a good many people, serve meals, do you.

A. I serve lots of meals every day.

No other or further evidence was introduced in the trial of said cause.

Thereupon counsel for the respective parties made their arguments to the jury.

Thereupon the Court orally instructed the jury as follows:

Instructions of Court to the Jury.

“The indictment found by the grand jury in this case charges that on the 3d day of May, 1922, at Reno, these defendants had intoxicating liquor in their possession; the second count charges that on the same day they sold intoxicating liquor, and the third count charges that on or about the 3d day of May, A. D. 1923, the defendants were maintaining a common nuisance at Reno, Nevada.

“The National Prohibition Act, notwithstanding the comments made on it, is a very carefully drawn piece of legislation. It has been pronounced constitutional by the highest courts in the land. It was passed because Congress believed it was the proper thing to do. The Eighteenth Amendment became a part of the [56] Constitution of the United States in the manner provided by the Constitution. The Amendment and the law itself have been adopted just as every other constitutional amendment, and every other Federal statute has been adopted. Whether the law was a good law or a bad one, was a question for Congress, not for us; it is immaterial whether it is good or bad, or whether it is wise or unwise whether it would have been better to have made it other than it is; it is the law of the land,

and under our oaths you and I are bound to enforce it as it is written. We have no right to say we will not enforce it because we do not approve it; our oaths are to the contrary. There is nothing for us to do but to decide whether these two defendants have been guilty of violating it. If they have violated it, it is your duty to bring in a verdict of guilty; or if their guilt has not been proven in the manner which will be pointed out, it is your duty to bring in a verdict of not guilty.

The first two charges of the indictment, the possession and the sale of intoxicating liquor, are prohibited in section 3 of Title II of the Act: "No persons shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, sell or possess any intoxicating liquor, except as authorized in this Act."

There is absolutely nothing in the Act which permits and authorizes one to have intoxicating liquor in a soft-drink place, absolutely nothing. One who has intoxicating liquor in his possession in a soft-drink place is violating the law, that is, if it is a conscious possession. One must know that he is violating the law in order to be guilty. In other words, if a man slips a bottle of whiskey into your house, and you know nothing about it, you are not guilty of possession, because it is not a conscious possession; but if the whiskey is put there [57] with your knowledge then it is a conscious possession. If you are maintaining and carrying on a soft-drink place, and some one brings a bottle of whiskey there and you know nothing about it, that

is not your possession, though it is on your premises; it is not your conscious possession; but if you find it and keep it, that is another matter.

Intoxicating liquor is defined in the first section of Title II of the Act which says:

“When used in Title II or Title III of this Act the word ‘liquor’ or the phrase ‘intoxicating liquor’ shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one half of one per centum or more of alcohol by volume, which are fit for beverage purposes.”

This language is very broad; it includes everything by whatever name or brand which contains one-half of one per centum or more by volume of alcohol, provided it is fit for use as a beverage. Anything fit for use as a beverage which is taken for the pleasure of drinking.

The third count is for maintaining a nuisance, defined in Section 21, Title II of the Act as follows:

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor.”

This language is also broad and comprehensive. It says any room, any house, any building, any boat, any vehicle, any structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title.

The charge in the indictment is that defendants "did unlawfully, wilfully and knowingly maintain a common nuisance, in that the said defendants did unlawfully, wilfully and knowingly keep in that certain building situate at Number 246 *Lake* [58] *in* the City of Reno, County of Washoe, State and District of Nevada, known as and called the 'New Toscano Hotel,' intoxicating liquor for sale; said liquor containing one-half of one per cent or more of alcohol by volume, and being fit for use for beverage purposes."

The essence of the charge of nuisance is that liquor is kept for sale as a matter of business. It is immaterial whether one or ten sales are made; if liquor is kept for sale, and that is the business and the intention of the party who keeps it, it is a violation of Section 21, Title II of the Act and the place becomes a common nuisance.

A question was asked by one of the jurors as to whether the title to the property cut any figure in this case, and my answer is unqualifiedly no. There are two proceedings under this Act; one is criminal and the other is in equity. This proceeding before you is a criminal proceeding; the other is equitable and comes before the court without a jury. Here the question is whether these parties kept this whiskey in the New Toscano saloon or

hotel for sale, as is charged in the indictment. It is immaterial whether they owned the building, whether they leased it, or whether they were there just over night; if they were there and keeping liquor for sale in a public place, they were guilty of a criminal offense. The equitable proceeding is against the owner of the property. It must be shown not only that he owned the place and that liquor was sold there, but that he knew it; otherwise his property cannot be closed as a nuisance. I am explaining this because the question has been asked. You are not concerned with it. If proceedings are taken to declare the property a nuisance, it must be in a new suit with evidence which goes against the owner of the property, showing that he had guilty knowledge of what was going on. [59]

Section 33 of the Act provides:

“After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor, shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.”

Possession of intoxicating liquor in a soft-drink place is not permitted under the Act; its possession in a soft-drink place, provided the possessor knows he has it, is presumed to be for the purpose of barter, sale, exchange, to be given away or otherwise disposed of; and the burden of the proof is upon the possessor in any action concerning the same, to

prove that such liquor was lawfully acquired, possessed and used.

The Government has made these charges and the defendants have denied them; that throws upon the Government the burden of proving defendants' guilt. It must be proven, as has been repeatedly said before you in these cases, beyond a reasonable doubt. The reasonable doubt must be a substantial doubt; a reasonable doubt is not every doubt; it is not a mere possibility that defendants' guilt has not been proven, but it is a substantial doubt as to whether their guilt has been established by the evidence or not.

This rule was not devised and made lightly or thoughtlessly; it has been a part of our jurisprudence for ages; it was designed, not to enable guilty men to escape, but to prevent the possibility of innocent men being convicted. If after careful consideration of all this testimony you are satisfied to a moral certainty that these defendants are guilty as charged, it is your duty to so find.

You are to accept the law as I give it. If I am wrong you are not responsible. If I make a mistake it can be corrected in another court, but if you fail to follow the instructions you are unfair to one party or the other, and you are not doing [60] as the law requires you to do. On the other hand, it is your duty to decide what is proven by this testimony. It is immaterial what counsel say or what the Court says as to the facts or as to what the facts prove; that is a matter which is up to your judgment. You cannot follow even the judgment of

the Court unless it appeals to you as being correct.

It is also your province to decide what credence shall be given to the testimony of the witnesses. Every witness who appears upon the witness-stand is himself an exhibit, his story is to be examined. It is presumed of course in the beginning that every witness will tell the truth, but unfortunately some of them do not. You are to weigh the testimony of the witnesses in the same scales. The testimony of one witness may weigh more than the testimony of another, or more than the testimony of a dozen witnesses against him. It is for you to determine who is telling the truth.

Mr. Scott is the principal witness for the Government. It is true he is an officer; it is equally true that men commit crimes, and it is essential to the administration of justice that we have policemen, secret service officers and sheriffs; it is necessary because there are criminals, and there must be some one whose duty it is to apprehend them, and to discover and obtain the evidence which is needed to bring them to justice. It does not necessarily follow because a man wears a star, or is a sheriff, or a secret service officer, or because he holds any other office under the Government, that he is prejudiced so that he cannot tell the truth, or that his evidence must be taken as absolute gospel. He may be mistaken, but you are entitled to consider the fact that he is an officer, and to throw that fact into the scales in determining how much credence you will give to his testimony. [61]

When you examine the testimony of the defendants you are to consider not only the reasonableness and probability of their story, but you may consider also the fact that they are interested in the result of the case.

There has been considerable testimony as to sales of liquor in April to Mr. Scott, one on the 10th and one on the 29th. Mr. Scott has testified that on those two occasions what he purchased, in his opinion, was intoxicating liquor. The law permits such testimony to be received as to the quality of liquor; you are to consider it for what it is worth. Testimony as to these two sales was introduced on the question of nuisance, not on the other charges, and you are to consider them, if they were made, one on the 10th of April, another on the 29th of April, and also the sale on the 3d of May, in determining whether these defendants were maintaining a place where liquor was kept for sale.

Possession of intoxicating liquor on the 3d of May is charged. If they had possession of the liquor and sold it, there were two offenses; but if it is found that they did not have possession of the liquor on the 3d and still sold it, the finding would be inconsistent; they must have had intoxicating liquor otherwise they could not have sold it; they must have been in possession of intoxicating liquor at the time it was sold, otherwise there could not have been a sale.

There are two forms of verdict prepared in this case. You can find the defendants guilty on one charge, or guilty on two, or guilty on all charges;

or not guilty on one, two or more; or you can find one guilty and the other not guilty, as your judgment dictates. [62]

Thereupon, after the instructions of the Court were read to the jury, the jury retired to deliberate upon their verdict.

BE IT FURTHER REMEMBERED, that thereafter the jury rendered its verdicts in the above-entitled cause, the same being in words and figures as follows, to wit:

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES

vs.

J. MONTELATICI and A. LAZARRI.

We, the jury in the above-entitled case, find the defendant J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,
Foreman. [63]

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARRI.

We, the jury in the above-entitled case, find the defendant, A. Lazzarri, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,

Foreman.

to which verdicts of the jury, counsel for the defendant J. Montelatici then and there duly excepted.

BE IT FURTHERED REMEMBERED that thereafter the defendant J. Montelatici, by his attorneys of record, in seasonable time, duly filed his motion in arrest of judgment by the defendant J. Montelatici, the same being in words and figures as follows, to wit:

In the District Court of the United States, within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ARRI,

Defendants.

MOTION IN ARREST OF JUDGMENT BY J.
MONTELATICI.

Comes now J. Montelatici, one of the defendants
above named and moves the Court to arrest the
judgment and that no judgment be rendered upon
the verdict against him, finding him guilty of main-
taining a nuisance by keeping for sale intoxicating
liquor, upon the following grounds, to wit:

1.

That the verdict is insufficient to support a judg-
ment.

2.

That said verdict is inconsistent and will not sup-
port a judgment, in this; that upon the same trial
and as a part of the verdict rendered by the jury
in the above-entitled cause, the jury returned a
verdict of not guilty as to this defendant, for sales
[64] of liquor and possession of liquor, on the same
date and upon the same transaction upon which a
verdict of guilty of maintaining a nuisance, that of
keeping intoxicating liquor for sale, was based.

All of which is inconsistent with the verdict of maintaining a nuisance rendered by the jury.

3.

That the count of the indictment charging the defendant with maintaining a nuisance, does not state facts sufficient to constitute a public offense, or any offense whatsoever, under the laws of the United States, and is not sufficient in law.

4.

That upon the whole record the judgment is erroneous and should not be rendered.

• FRAME & RAFFETO,

Attorneys for the Defendant J. Montelatici.
which said motion in arrest of judgment having been overruled, the defendant J. Montelatici, by his attorneys, then and there duly excepted.

BE IT FURTHER REMEMBERED that thereafter, and in seasonable time, the defendant J. Montelatici by his attorneys, duly filed his motion for a new trial, the same being in words and figures as follows, to wit:

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

MOTION OF J. MONTELATICI FOR A NEW TRIAL.

Comes now J. Montelatici, one of the defendants above named and moves the Court to set aside the verdict of the jury heretofore rendered against him in the above-styled cause, finding him guilty of maintaining a nuisance by keeping intoxicating liquors for sale, upon the following grounds, to wit:

1.

That said verdict is contrary to law.

2.

That said verdict is contrary to the evidence.
[65]

3.

That said verdict is contrary to the law and the evidence.

4.

That said verdict is inconsistent and will not support a judgment in this; that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, upon the same date and upon the same transaction upon which a verdict of guilty of maintaining a nuisance, that is, keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of guilty of maintaining a nuisance rendered by the jury.

5.

Misdirections of the jury as to matters of law.

6.

Error of the Court in admitting and rejecting testimony.

7.

That the evidence is insufficient to support the verdict.

FRAME & RAFFETTO,

Attorneys for Defendant J. Montelatici.

And thereafter the Court denied the said motion for a new trial, to which ruling the defendant J. Montelatici, by his attorneys, then and there duly excepted.

Thereupon the Court rendered its judgment and sentence upon the said verdict of the jury, as to the defendant Armatraddo Lazzari, on the first day of December, 1922, which judgment and sentence required that the said defendant Lazzari be incarcerated in the Washoe County Jail, Washoe County, State of Nevada, for a period of five months, and assessed a fine of \$350.00 against the said defendant Lazzari, and costs, to which the defendant by his counsel, then and there duly excepted.

And thereupon the Court rendered its judgment and sentence upon the said verdict of the jury, as to the defendant J. Montelatici, on the 12th day of January, 1923, which judgment and sentence [66] required that the said defendant Montelatici be incarcerated in the Washoe County Jail, Washoe County, State of Nevada, for a period of four months and costs, to which the defendant, by his attorneys, then and there duly excepted.

AND BE IT REMEMBERED that subsequently and prior to the sentencing of the said defendant, J. Montelatici, the then attorneys for the defendants in the above-entitled case, withdrew their appearance as attorneys for said defendants, and that Milton M. Detch, Esq., was duly and regularly substituted as the attorney for the defendant, J. Montelatici.

And for as much as the proceedings and the matters of exception above set forth do not fully appear of record, the defendant, J. Montelatici, by his attorney, tenders this bill of exceptions and prays that the same be signed and sealed by the court here, pursuant to the statute in such case made and provided.

Which is done accordingly this 23d day of March, A. D. 1923.

E. S. FARRINGTON,

Judge.

It is hereby stipulated that the foregoing may be settled by the Court as the bill of exceptions herein.

GEORGE SPRINGMEYER,

United States Attorney,

CHAS. A. CANTWELL,

Asst. U. S. Attorney,

Attorneys for the Plaintiff.

MILTON M. DETCH,

Attorney for the Defendant. [67]

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazzari, Defendants. Bill

of Exceptions for the Defendant J. Montelatici. Filed March 23, 1923. E. O. Patterson, Clerk. Milton M. Detch, Attorney for Defendant J. Montelatici. [68]

In the District Court of the United States for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Order Extending Time to File Record and Docket Cause (Dated March 24, 1923).

Good cause being shown, IT IS ORDERED that the defendant, J. Montelatici, be, and he is hereby, allowed thirty days from and after this day within which to prepare and file record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of March, 1923.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Order Extending Time to File Record on Appeal. Filed March 24, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [69]

In the District Court of the United States for the
District of Nevada.

No. 5495.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

**Certificate of Clerk U. S. District Court to Trans-
cript of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants, said case being No. 5495 on the docket of said court.

I further certify that the attached transcript, consisting of 71 typewritten pages numbered from 1 to 71, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto. as the same appears from the originals of record and on file in my office as such

clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$27.35, has been paid to me by Mr. M. M. Detch, attorney for the defendant J. Montelatici in the above-entitled cause. [70]

And I further certify that the original writ of error and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and seal of said United States District Court this 28th day of March, A. D. 1923.

[Seal]

E. O. PATTERSON,

Clerk, U. S. District Court, District of Nevada.

[71]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZARRI,

Defendants.

Writ of Error.

The President of the United States, to the Honorable the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in said District Court, before you, between the United States, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants, a manifest error hath happened, to the great damage of the said defendant G. Montelatici, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California within thirty days from date hereof, in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [72] that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 3d day of February, 1923.

[Seal]

E. O. PATTERSON,
Clerk of the United States District Court, District of Nevada.

Allowed by:

E. S. FARRINGTON. [73]

[Endorsed]: No. 5495. Dept. ——. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. [74]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Citation to Writ of Error.

To the United States of America, Defendant in
Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's office of the District of Nevada, wherein J. Montelatici is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. S. FARRINGTON,
U. S. District Judge in and for the District of Ne-
vada, this 3d day of February, 1923.

E. S. FARRINGTON,

Judge of Above-entitled Court.

[Seal]

Attest: E. O. PATTERSON,

Clerk.

I hereby, this —— day of January, 1923, accept
due personal service of the foregoing citation on be-
half of the United States of America, defendant in
error.

Attorney for United States. [75]

[Endorsed]: No. 5495. In the District Court of
the United States in and for the District of Ne-
vada. United States of America, Plaintiff, vs. J.
Montelatici and A. Lazzari, Defendants. Citation
to Writ of Error. Filed Feb. 3, 1923. E. O. Pat-
terson, Clerk. [76]

[Endorsed]: No. 4005. United States Circuit
Court of Appeals for the Ninth Circuit. J. Monte-
latiçi, Plaintiff in Error, vs. The United States of
America, Defendant in Error. Transcript of Rec-

ord. Upon Writ of Error to the United States
District Court of the District of Nevada.

Received March 29, 1923.

F. D. MONCKTON,
Clerk.

Filed April 9, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. **4008**

IN THE 8
United States Circuit Court of Appeals
For the Ninth Circuit

ALLIANCE INSURANCE COMPANY, BRIT-
ISH & FEDERAL FIRE UNDERWRITERS
OF THE NORWICH UNION FIRE INSUR-
ANCE SOCIETY, COMMERCIAL UNION
ASSURANCE COMPANY, LIMITED, AND
STAR INSURANCE COMPANY OF
AMERICA, Corporations,

Plaintiffs in Error,

vs.

THEODORE ENDERS,

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Eastern Division.*

No.....

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

ALLIANCE INSURANCE COMPANY, BRIT-
ISH & FEDERAL FIRE UNDERWRITERS
OF THE NORWICH UNION FIRE INSUR-
ANCE SOCIETY, COMMERCIAL UNION
ASSURANCE COMPANY, LIMITED, AND
STAR INSURANCE COMPANY OF
AMERICA, Corporations,

Plaintiffs in Error,

vs.

THEODORE ENDERS,

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Eastern Division.*

ATTORNEYS OF RECORD.

For Plaintiffs in Error.

GEORGE F. SHELTON,
Butte, Montana.

FINIS BENTLEY,
Pocatello, Idaho.

For Defendant in Error.

T. D. JONES,
Pocatello, Idaho.

B. W. DAVIS,
Pocatello, Idaho.

STANDROD & STANDROD,
Pocatello, Idaho.

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*In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the
County of Bannock.*

(Removed to U. S. District Court, District of Idaho.)

THEODORE ENDERS,

Plaintiff,

vs.

ALLIANCE INSURANCE COMPANY, a Cor-
poration,

Defendant.

No. 357.

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business in Philadelphia in said state; that said corporation is engaged in the business of accepting risks for loss or damage by fire, and is engaged in what is commonly known as the fire insurance business and is a fire insurance company; that said defendant has complied with the laws of the State of Idaho with reference to foreign corporations doing business in said state and is now, and

at all times in this complaint mentioned has been doing business in the State of Idaho.

II.

That the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North Half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three-story frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned.

III.

That on the 27th day of April, 1921, at Soda Springs, Idaho, in consideration of the payment by the plaintiff to the defendant, of the premium of \$226.00, the defendant, by its agent, duly authorized thereto, executed and delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not exceeding \$4000.00, upon one three-story shingle roof, frame building occupied for hotel and apartment house purposes situate

on the East side of Dillon street, between Hooper and Railroad streets, in Soda Springs, Idaho; and the furniture, fixtures and furnishing material, silver ware, crockery, glassware, supplies, provisions and fuel and all apparatus or implements contained in said building, said building being insured in the amount of \$3000.00 and the furniture, fixtures, and etc., in the amount of \$1000.00, a copy of which policy is annexed hereto, marked Exhibit "A", and by this reference incorporated herein and made a part of this complaint and this paragraph, the same as if herein set out in full.

IV.

That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property heretofore described and before the issuance by defendant of its insurance policy, Exhibit "A", the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant's agent who issued and delivered said policy, Exhibit "A" to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase

price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear, and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included in the Fred J. Kiesel estate and that he would annex the clause in proper manner; that in issuing said policy, as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel estate, mortgagee or trustee, as its interest might appear; "that the Fred J. Kiesel estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interest in the same."

V.

That on the 7th day of June, 1921, said hotel, or apartment house, together with all of the furniture, fixtures, and furnishing materials, silver, plate ware, china and glass ware, and cutlery, supplies, provisions and fuel, as described in said policy, and all utensils used in and about said business were

totally destroyed by fire, the cause of which was and is unknown to plaintiff.

VI.

That plaintiff's loss as a result of said total destruction of the insured property heretofore described, was \$25,000.00.

VII.

That immediately after the destruction of said insured property by fire, and on the same day, the plaintiff notified Wm. H. Jackson, Jr., the defendant's agent, of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the loss and destruction of the insured property by fire; that in response to said notification given to defendant's agent by this plaintiff, the defendant sent its agents and adjusters to the scene and place of said fire for the purpose of adjusting said loss; that said adjusters, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjusters, agents and representatives to inspect and adjust said loss, the loss being a total loss, the defendant waived any further notice and proof of loss by the plaintiff and waived written proof of loss within

sixty days as required by Exhibit "A", annexed hereto.

VIII.

That the plaintiff had insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00 on said building and \$4,000.00 upon the furniture and contents thereof.

IX.

That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.

X.

That the loss of said premises was a total loss and that no disagreement has been had between plaintiff and defendant as to the amount of the loss thereof and that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant; and that no appraisal of said loss has been required or requested by defendant.

XI.

That the defendant has not paid the said loss nor any part thereof, demand having been made for payment.

XII.

That plaintiff has performed all of the conditions of said policy, Exhibit "A", on his part to be performed.

XIII.

That one year has not elapsed since the total loss of said insured premises by fire.

XIV.

That this plaintiff is sometimes known as Theo. Enders, and said insurance policy, Exhibit "A", was issued to Theo. Enders instead of Theodore Enders, but that Theodore Enders and Theo. Enders are one and the same person.

WHEREFORE, plaintiff prays that he have and receive judgment of and from the defendant in the amount of \$4,000.00, together with interest thereon at 7% per annum from the 7th day of June, 1921, and for all costs of suit herein expended and for such other and further relief as to the Court may seem just and equitable.

STANDROD & STANDROD,
B. W. DAVIS,
Attorneys for the Plaintiff,
Residing at Pocatello, Idaho.

(Duly verified.)

STANDARD FIRE INSURANCE POLICY	
No. 66083	Stock Company. Amount \$4000.00
	Rate 5.65

Pacific Department San Francisco, Cal.

Standard Forms Bureau Form 291.

(Building and furniture and fixtures).

- *1. \$3000.00 On the three-story single roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationery heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment

purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.

- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tools, implements and utensils used in the business, and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On.....

*4. \$ Nil On.....

No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceeding the item.

"Limitation on Amount Recoverable on One Article." Claims for loss on any one picture, piece of statuary, curiosity, or work of art, shall not exceed Two Hundred and Fifty (\$250.00) Dollars, unless specifically insured.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 2 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to property of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms, and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

Loss, if any, on building only, subject, however, to all the terms and conditions of this policy, payable to Fred J. Kiesel Estate, mortgagee and assured.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 66083 of the Alliance Insurance Co., Agency at Pocatello, Idaho. Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent.*

FOR OTHER PROVISIONS SEE REVERSE
SIDE OF THIS RIDER.

Provisions Referred to in and made part of this rider. (No. 291).

“Permits.” Permission granted to make alteration or repairs to the above described without limit of time, and to build additions, and if of like con-

struction and communicating and in contact therewith, this policy shall cover on or in same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in cases of fifty pounds, nitro-glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specified permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Standard Forms Bureau Form 371.

MORTGAGEE CLAUSE WITH FULL CONTRIBUTION.

(To be attached only to policies covering buildings).

Loss or damage, if any, under this policy, on buildings only, shall be payable to Fred J. Kiesel Estate, mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such in-

creased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right, on like notice, to cancel this agreement.

Condition Four—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Attached to Policy No. 66083 of the Alliance Insurance Co., Issue to Theo Enders.

Agency at Pocatello, Idaho. Dated April 27th 1921.

WM. H. JACKSON, Jr., *Agent.*

Standard Forms Bureau Form 199.

ENDORSEMENT BLANK.

Endorsement dated April 29th, 1921. Agency at
Pocatello, Idaho.

Attached to Policy No.

Issued to Theo Enders.

Map Sheet.....Block.....No.....Special Rate
Page.... Line....O. P.....

Commencement of Policy/ Expiration of Policy/
Amount insured/ Old Rate/ New Rate/ Extra Pre-
mium/ Return Premium/

The coverage of this policy shall not include the cost of foundations or excavations, and those items shall not be considered in estimating the value of said building for any purpose under this policy.

WM. H. JACKSON, Jr., *Agent*.

THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specifically referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions, no officer, agent, or representative shall have such power or be deemed or held to have waived such conditions, provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by law to be stated in this policy.—This policy is in a stock corporation.

IN WITNESS WHEREOF, this company has executed and attested these presents; but this Policy shall not be valid unless countersigned by the duly authorized Agent of the company at Pocatello, Idaho.

JOHN KIEMIE,
Secretary.

BENJAMIN RUSH,
President.

Countersigned at Pocatello, Idaho, this 27th day of April, 1921.

WM. H. JACKSON, Jr., *Agent.*

This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on given notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership or if the subject of insurance be a building on ground not owned by the insured in fee-simple or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of the insured, take place in the interest, title, or possession as the subject of insurance (except change of occupants without increase of hazard) whether by legal process of judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas

or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, bensole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by day light or at a distance not less than ten feet from artificial light): or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This society shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in the neighboring premises; or (unless fire insures, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This society shall not be liable for loss to accounts, bills currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, imple-

ments, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this society.

This policy may by a renewal be continued under the original stipulations, in consideration for premium for the renewed term, provided that any increase of hazard must be made known to this society at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured: or by the society by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this society retaining the customary short rate; except that when this policy is cancelled by this society by giving notice it shall retain only the pro rata premium.

If, with the consent of this society, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the condi-

tions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining, in the original location, shall, for the ensuing five days only, cover the property so removed to the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new location; but the society shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and sched-

ules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this society all that remains of any property herein described, and submit to examinations under oath by any person named by this society, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this society or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this society each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively se-

lected by them and shall bear equally the expenses of the appraisal and umpire.

This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.

This society shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this society in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this society shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this society shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this society by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss and damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contract of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Endorsed, filed May 22, 1922.

W. D. McREYNOLDS, Clerk.

By Theo J. Turner, Deputy.

(Alliance Insurance Company, Defendant.)
No. 357.

AMENDMENT TO COMPLAINT.

VII-A.

On or about June 29, 1921, in the office of defendant's adjustors, Croxford & Young, at Salt Lake City, Utah, one W. H. Sherman, agent of this plaintiff, had a conversation with the defendant's adjustors, at which time he informed the said Young that the plaintiff had requested that he take up with said adjustors the matter of adjusting the loss occasioned by the fire aforesaid, and that at said time and place the said Young stated to the said W. H. Sherman that he, Young, had been to Soda Springs, Idaho, for the purpose of adjusting the loss by fire of the property covered by the said policy and that he had found, in

inspecting the premises, that there was a total loss of the property so covered, whereupon, the said W. H. Sherman in behalf of said plaintiff asked the said Young what it was necessary for him to do as he was anxious to supply any information or reports desired or necessary, and that at said time the said Young told him there was nothing at that time that could be done and that there was nothing that he wanted from the said Sherman or the plaintiff at that time, but that he was looking after the adjustment of the matter and would call upon the said Sherman and the plaintiff for such further information and reports as might be desired, and that the said Young thereafter did call upon the said W. H. Sherman for certain information and reports, all of which were supplied as aforesaid.

That on the 19th day of August, 1921, defendant requested the plaintiff to make a sworn statement setting forth the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property, a copy of all description and security of all policies, any change in the title, use, occupation or exposures of said property since the issuance of the same, by whom and for what purpose the building described in said policy of insurance,

and the several parts thereof, were occupied at the time of the fire; that pursuant to said request this plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted and retained without objection by the defendant, and that for many months thereafter the defendant, through its agents and adjusters, continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff, written information and documents pertaining to plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, as mentioned in said policy, and that the said defendants, by its acts and conduct,, as aforesaid, and by reason of the matters and things in this complaint alleged, has waived proof of loss as required in said policy and on account of its acts and conduct as aforesaid is estopped from setting up any defense on the grounds of failure to furnish proof as set forth in said policy.

Endorsed, Filed Oct. 14, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 357.

ANSWER.

Comes now the above named defendant and for its answer to the complaint of the plaintiff on file hereon, admits, denies and alleges as follows, to-wit:

I.

Admits the corporate character and business of the defendant, and that the defendant has been doing business and carrying on business in the State of Idaho, as alleged in paragraph 1 of said complaint.

II.

Answering paragraph 2 of said complaint defendant denies any information or belief as to whether at any time or at all the plaintiff was the vendee of an executory contract entered into by the plaintiff with the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North One-half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) or of any other lot or lots whatever in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon or otherwise, or in any manner or at all; or whether the plaintiff at any time in any manner or at all had an insurable interest in a three (3) story frame building or the contents thereof, erected or situate on the said premises last described, which said building was known as the

“Idanha Hotel” at the time of its insurance or at the time of its destruction by fire as set forth in said complaint, or at any other time, or in any manner whatever or at all; and therefore, for the reason that the said defendant has no information or belief upon the said subject sufficient to enable it to answer said allegation of the complaint as above set forth, it so states in this manner as above set forth and denies the same on that ground.

III.

Answering paragraph 3 of said complaint this answering defendant admits that on the 27th day of April, 1921, in consideration of the payment by the plaintiff to the defendant of the sum of Two Hundred Twenty-six (\$226.00) dollars, the defendant delivered to the plaintiff its policy of insurance, a copy of which is attached to plaintiff's complaint marked “Exhibit A” and thereof made a part; which said policy of insurance was executed and attested by the defendant corporation by their President, Benjamin Rush, and Secretary, John Kie-man, and it was expressly provided that the policy “shall not be valid unless countersigned by the duly authorized agent of the society at Pocatello,” that said policy was countersigned at Pocatello, Idaho, on the 27th day of April, 1921, by W. H. Jackson, Jr., Agent; that by reason of the terms of said policy of insurance the defendant insured the plaintiff for the term of one (1) year from the 27th day of April,

1921, at noon, until the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4000.00) dollars upon the property described in the said policy as follows, to-wit:

- “*1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction, communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.
- x2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments, mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tools, implements and utensils used in the

business and signs and (PROVIDING the insured shall be liable by law for loss or damage thereto or shall have specifically assured liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith."

As set forth in the said policy of insurance upon the terms and conditions therein specified and not otherwise.

Admits that "Exhibit A" attached to the plaintiff's complaint is a correct copy of the policy of insurance.

Denied, except as hereinbefore specifically admitted, that the defendant by its Agent duly authorized thereto, executed or delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4000.00) dollars upon a three-story, shingle roof frame building, occupied for hotel and apartment house purposes, situate on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho;; and the furni-

ture, fixtures, and furnishing materials, silverware, crockery, glassware, supplies, provisions and fuel and all apparatus, or implements contained in said building; said building being insured in the amount of Three Thousand (\$3,000.00) dollars and the furnishings, and fixtures and etc., in the amount of One Thousand (\$1000.00) dollars.

Denies that the policy of insurance was executed by the defendant at Soda Springs, Idaho.

IV.

As to the allegations of paragraph 4 of said complaint, admits that no written application was made by the plaintiff to the defendant or its agent for the issuance of said insurance policy.

Denies that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property described, or at any other time, or before the issuance by defendant of insurance policy "Exhibit A" or at any other time specifically or otherwise advised or informed the agent of said defendant, to-wit: William H. Jackson, Jr., that the Natural Mineral Water Company had been the original owner of said property or that the said Natural Mineral Water Company had sold the same to plaintiff, or that said Natural Mineral Water Company had placed a deed thereto in escrow in Soda Springs Bank, or that said deed or any deed had been placed in Soda Springs Bank with instructions to said

bank that when the purchase price was paid in full that plaintiff should receive the deed.

Denies that plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interests might appear.

Denies that said agent advised this plaintiff that he understood about the Natural Mineral Water Company or that it was included in the Fred J. Kiesel Estate, or that he would annex the clause in proper manner.

Denies that William H. Jackson, Jr., by whom said policy of insurance was countersigned, being policy attached to plaintiff's complaint and marked "Exhibit A" ever at any time or in any manner or at all, received any information whatever from said plaintiff that the Natural Mineral Water Company was the owner of the property or that there was any agreement whatever on the part of said William H. Jackson, Jr., agent as aforesaid, or otherwise, to insert in said policy any clause whatever, otherwise than appears in said policy, marked "Exhibit A".

Denies that in issuing said policy, said agent by mistake or inadvertance made the loss, if any, on the building therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustee as its interest might appear, or that there was any mistake or inadvertance whatever in making said loss on the

building payable to the Fred J. Kiesel estate, mortgagee or trustee; and this defendant avers that it has no information or belief upon the subject sufficient to enable it to answer the following allegation of the complaint, to-wit:

“that the Fred J. Kiesel estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same.”

And, therefore, defendant denies the said allegation upon that ground.

V.

As to the allegations of paragraph 5 of said complaint, admits that on the 7th day of June, 1921, said hotel and apartment house, together with a portion of the furniture, fixtures, and furnishing materials, silver, plate ware, china and glassware, and cutlery, supplies, provisions and fuel and certain utensils used in and about said business were partially destroyed by fire, but denies that the loss was total or that the cause of said fire was, or is unknown to the plaintiff.

VI.

Answering paragraph 6 of said complaint, this defendant denies that plaintiff's loss as a result of said partial destruction of the insured property de-

scribed, was Twenty-five Thousand (\$25,000) dollars, or any other or greater sum than Twenty-five Hundred (\$2500) dollars.

VII.

Answering the allegations of paragraph 7, this defendant denies that immediately after the destruction of said insured property by fire, or at any other time whatever, or on the same date, the plaintiff notified William H. Jackson, Jr., alleged to have been at that time, the defendant's agent of Pocatello, Idaho, of said loss by fire, or that thereafter, or within forty-eight (48) hours after June 7th, 1921, or at any other time, William H. Jackson, Jr., notified the defendant herein, either by telegram or by written notice of the loss or destruction of the insured property; that in response to said notifications given to defendant's agent by plaintiff, defendant sent its agent or adjusters to the scene, or the place of said fire for the purpose of adjusting said loss, in any manner whatever or at all.

Admits that certain representatives of the defendant went to Soda Springs, Idaho, and made some investigation into the loss and inspected the premises whereon the said property had stood, pursuant to, and in accordance with the terms and conditions of the policy of insurance, as follows, to-wit:

"This society shall not be held to have waived any provision or condition of this policy of any forfeiture thereon by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required."

Denies that said defendant, by sending any of its representatives or adjusters or agents to inspect said loss, waived any other or further notice or proof of loss by the plaintiff, or waived written proof of loss within sixty days as required by "Exhibit A" attached to plaintiff's complaint and thereof made a part.

Denies that the defendant at any time or in any manner whatever, sent any adjustor or agent or representative to adjust said loss or that the loss was a total loss; and in this connection this defendant avers the fact to be:

That on the 19th day of August, 1921, the defendant notified the plaintiff that in the event he made claim under said policy sued on in this action, for loss to the property insured under said policy, alleged to have been caused by fire on June 7th, 1921, that he was requested to comply with all of the terms and conditions of said insurance contract and his attention was particularly called to that

portion of the same, recited in lines 70 to 76 inclusive, which was quoted in said notification and which said notification was sent by registered mail and duly received by said plaintiff, a copy of which is hereto attached and marked "Exhibit I" hereby referred to and hereof made a part; that there never was at any time or in any manner any waiver by the defendant of the terms and conditions of said policy of insurance.

VIII.

As to the allegations of paragraph 8 of said complaint, this defendant admits that the plaintiff had:

"Insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00 on said building and \$4,000.00 on the furniture and contents thereof."

IX.

As to the allegations of paragraph 9 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

"That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged."

And, therefore, it denies the same on that ground.

X.

As to the allegations of paragraph 10 of said complaint, denies that the loss of said premises was a total loss or that no disagreement has been had between plaintiff and defendant as to the amount of the loss.

Admits that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant.

Admits that no appraisal of said loss has been required or requested by the defendant.

XI.

Answering the allegation of paragraph 11 of said complaint, this defendant admits that defendant has not paid said loss or any part thereof.

Denies that demand has been made for payment.

XII.

Answering the allegations of paragraph 12, this defendant denies that the plaintiff has performed all of the conditions of said policy "Exhibit A" on his part to be performed; and in this connection this defendant avers the fact to be:

That the plaintiff did not immediately after the fire give notice of any loss thereby in writing, to this defendant; did not protect the property from further damage; did not forthwith separate the damaged and undamaged personal property; did not put the same in the best possible order; did not

make a complete inventory of the same stating the quantity and cost of each article and the amount claimed thereon; did not, within sixty days after the fire, render a statement to the defendant signed and sworn to by him stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and all other persons in the property; the cash value of each item, thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not covering any of the said property and a copy of all of the descriptions, and schedules in all other policies, or any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of said policy of insurance; by whom and for what purpose the building described in said policy, and the several parts thereof, were occupied at the time of the fire; and in each and all of these respects he failed to comply with the terms and conditions of the policy on his part to be done and performed.

XIII.

Answering paragraph 13 this defendant admits that one year has not elapsed since the loss of said insured premises by fire, but, denies that the loss was total.

XIV.

Answering paragraph 14 of said complaint, this defendant has no information or belief upon the

subject sufficient to enable it to answer the following allegation:

“That this plaintiff is sometimes known as Theo Enders, and said insurance policy, Exhibit “A”, was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.”

And, therefore, denies the same on that ground.

FURTHER ANSWERING SAID COMPLAINT AND FOR A FIRST AND AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under the contract of insurance referred to in the plaintiff's complaint, and marked “Exhibit A” and thereof made a part, it was, among other things, provided:

“This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereon, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; conditions, provisions and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no offi-

cer, agent or other representative of this society company shall have power to waive any provision or condition agreement of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions and agreements, no officer, agent or representative shall have such power or be deemed or held to have waived such conditions, provisions and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Also:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss."

That the plaintiff, on the 27th day of April, 1921, at the time of the issuance of said policy of insurance, was not the owner of said real property described in said policy of insurance, nor did he have any insurable interest therein; nor was the said plaintiff, at the time of the fire, when the said property is alleged to have been destroyed, to-wit: on the 7th day of June, 1921, the owner of said property nor did he have any insurable interest

therein; but the said real property stood in the same and was owned by the Natural Mineral Water Company, and the said Natural Mineral Water Company at said time was the owner of said property and the said plaintiff did not, at either of said times have any right, title or interest thereto.

II.

That said plaintiff at the time when the policy of insurance was issued obtained and procured to be attached to said policy of insurance, the mortgagee clause set forth in said policy of insurance attached to plaintiff's complaint in favor of the Fred J. Kiesel Estate, mortgagee, as its interests might appear, and had inserted in said policy the provisions that the loss, if any, in building only, subject, however, to all of the terms and conditions of said policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

That later and on the 20th day of September, 1921, and after the said fire, the said plaintiff set forth and specified in a statement made by him to this defendant that the said Kiesel estate has and holds an interest in said property as security in the sum of about Fifty-four Hundred (\$5400) dollars, and that there were and are no other incumbrances thereon.

That the said plaintiff in the complaint filed in this action, in paragraph 4 of said complaint, sets forth and specified that the said Fred J. Kiesel Es-

state was not the mortgagee or trustee of said property, and did not at that time nor has it at any time since the issuing of said policy, have any interest whatever, in or to said property; that by reason of the allegations of the said complaint there was and is a material misrepresentation in writing as to a material fact and circumstances concerning this insurance and the subject thereof, and of the interest of the assured in the property, and under the terms of the policy above quoted, the said policy is void and the plaintiff has no right to recover thereon.

FURTHER ANSWERING SAID COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE, this defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint marked "Exhibit A" and made a part thereof, it was, among other things, provided as follows, to-wit:

"If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this so-

ciety, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire;"

Also:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

That the said plaintiff did not immediately after the fire, on the 7th day of June, 1921, or at any other time, give notice in writing to the defendant nor did he protect the property from further damage or forthwith separate the damaged from the undamaged property or put it in the best possible order; or make a complete inventory of same stating the quantity and cost of each article and the amount claimed thereon; nor did he, within sixty days after the said fire, to-wit; within sixty days after June 7th, 1921, render a statement to said defendant signed and sworn to by said plaintiff st

ing the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and of all others in the property, the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not, covering any of said property; a copy of all descriptions and schedules of all policies; any change in the title, use, occupation or exposures of said property since the issuing of said policy; by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire, nor did he furnish any of the said items in any manner whatever or at all, or comply with any of the requirements of said clause and conditions of said policy; nor was the same at any time extended in writing or otherwise by the defendant and by reason thereof, and the failure and neglect on the part of the plaintiff to comply with and perform the conditions of said policy as above set forth, said plaintiff was precluded from maintaining or sustaining in any court of equity this suit or any suit.

Further answering said complaint and by way of THIRD AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint, marked

"Exhibit A" and thereof made a part, it was among other things provided:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * * if the interest of the insured be other than unconditional and sole ownership;"

That the ownership of the said plaintiff was not at the time of the issuance of said policy, or at the time of the fire, sole or unconditional but the said title to said real property described in the said policy of insurance was at all of said times in the Natural Mineral Water Company; and there was no agreement endorsed on said policy or added thereto relative to said ownership; and by reason thereof the said policy was and is void, and the plaintiff has no cause of action against this defendant.

Further answering said complaint and for a FOURTH AFFIRMATIVE DEFENSE, this defendant alleges:

I.

That under and by virtue of said insurance contract referred to in plaintiff's complaint and marked "Exhibit A" and thereof made a part, it was among other things, provided:

"This society shall not be liable beyond the actual cash value of the property at the time of any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with prop-

erty deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertainment or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described."

II.

That there was no ascertainment whatever of the actual cash value of the property at the time the loss occurred, nor was the same estimated in any manner whatever or attempted to be estimated; nor was there any appraisement of the same, nor any effort on the part of the plaintiff to have determined in any manner the actual loss, if any, sustained by the said fire; nor was the sum for which the defendant might or could be liable under the terms of the policy determined at any time

whatever prior to the bringing of this suit either sixty days thereto or any other time, nor has there been any determination or estimate of the amount or value of the property alleged to have been destroyed by fire prior to or at the time of the commencement of this suit.

WHEREFORE, and by reason of the said provisions of the policy above set forth and the failure and neglect of the plaintiff to conform to the terms thereof no cause of action exists in favor of the plaintiff and against the defendant at the time of the commencement of this suit or any subsequent time.

WHEREFORE, defendant having fully answered, prays to be dismissed with its costs in its behalf sustained.

WHITE & BENTLEY,
Pocatello, Idaho,
Attorneys for Defendant.

GEORGE F. SHELTON,
Butte, Montana,
Of Counsel for Defendant.
(Duly verified.)

EXHIBIT I."

Croxford & Young,
Adjusters of Fire Losses,
320-3 Ness Building.

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo. Enders,
Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 66083 of the Alliance Insurance Company of Philadelphia for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70-76 inclusive, reading as follows, to-wit:

"Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire."

Yours truly,

ALLIANCE INSURANCE COMPANY.

By Croxford & Young,

Adjusters.

Y/JHB.

"Registered."

Endorsed, Filed Sept. 5, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

(Removed to U. S. District Court, District of Idaho)

THEODORE ENDERS,

Plaintiff,

vs.

BRITISH & FEDERAL FIRE UNDERWRIT-
ERS OF THE NORWICH UNION FIRE
INSURANCE SOCIETY, Ltd., a Corpora-
tion.

Defendant.

No. 358.

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That the defendant is a foreign corporation and is engaged in the business of accepting risks for loss or damage by fire, and is carrying on what is commonly known as the Fire Insurance business, as is a Fire Insurance Company; that said company is now, and at all times in this complaint mentioned, has been doing and carrying on business in the State of Idaho.

II.

That the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North Half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) in the Village of Soda Springs, Caribou County, State of Idaho, to-

gether with the appurtenances thereon, had an insurable interest in a three-story frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned.

III.

That on the 27th day of April, 1921, at Soda Springs, Idaho, in consideration of the payment by the plaintiff to the defendant of the premium of \$226.00, the defendant, by its agent, duly authorized thereto, executed and delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not exceeding \$4,000.00, upon one three-story shingle roof, frame building occupied for hotel and apartment house purposes, situate on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures, and furnishing material, silver ware, crockery, glass ware, supplies, provisions and fuel and all apparatus, or implements contained in said building, said building being insured in the amount of \$3000.00 and the furniture, fixtures, and etc., in the amount of \$1000.00, a copy of which policy is annexed hereto, marked Exhibit "A" and by this reference in-

corporated herein and made a part of this complaint and this paragraph, the same as if herein set out in full.

IV.

That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property heretofore described, and before the issuance by defendant of its insurance policy, Exhibit "A", the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant's agent who issued and delivered said policy, Exhibit "A" to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included in the Fred J. Kiesel Estate and that he would annex the clause in proper manner; that in issuing

said policy as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustee, as its interest might appear; "that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same."

V.

That on the 7th day of June, 1921, said hotel or apartment house, together with all the furniture, fixtures and furnishing materials, silver, plate ware, china and glass ware, and cutlery, supplies, provisions and fuel, as described in said policy, and all utensils used in and about said business were totally destroyed by fire, the cause of which was and is unknown to plaintiff.

VI.

That plaintiff's loss as a result of said total destruction of the insured property heretofore described, was \$25,000.00.

VII.

That immediately after the destruction of said insured property by fire, and on the same day, the

plaintiff notified Wm. H. Jackson, Jr., the defendant's agent of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the loss and destruction of the insured property by fire; that in response to said notification given to defendant's agent by this plaintiff, the defendant sent its agents and adjustors to the scene and place of said fire for the purpose of adjusting said loss; that said adjustors, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjustors, agents and representatives to inspect and adjust said loss, the loss being a total loss, the defendant waived any further notice and proof of loss by the plaintiff and waived written proof of loss within sixty days as required by Exhibit "A", annexed hereto.

VIII.

That the plaintiff had insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00, on said building and \$4,000.00 on the furniture and contents thereof.

IX.

That said building herein described was occu-

pied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.

X.

That the loss of said premises was a total loss and that no disagreement has been had between plaintiff and defendant as to the amount of the loss thereof and that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant; and that no appraisal of said loss has been required or requested by defendant.

XI.

That the defendant has not paid the said loss nor any part thereof, demand having been made for payment.

XII.

That plaintiff has performed all of the conditions of said policy, Exhibit "A", on his part to be performed.

XIII.

That one year has not elapsed since the total loss of said insured premises by fire.

XIV.

That this plaintiff is sometimes known as Theo Enders, and said insurance policy, Exhibit "A", was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.

WHEREFORE, plaintiff prays that he have and receive judgment of and from the defendant in the amount of \$4,000.00, together with interest thereon at 7% perr annum from the 7th day of June, 1921, and for all costs of suit herein expended and for such other and further relief as to the court may seem just and equitable.

STANDROD & STANDROD,
B. W. DAVIS,
Attorneys for the Plaintiff,
Residing at Pocatello, Idaho.
(Duly verified.)

EXHIBIT "A"

STANDARD FIRE INSURANCE POLICY Stock Company.

No. 54277	Amount	\$4000.00
	Rate	5.65
	Premium	\$ 226.00

BRITISH & FEDERAL FIRE UNDERWRITERS

Of the Norwich Union Fire Insurance Society,
Limited.

In consideration of the stipulations herein named and of Two hundred Twenty-six and no/100 . . . Dollars. Premium, does insure Theo Enders . . . for the term of One year from the twenty-seventh day of April, 1921, at noon, to the twenty-seventh day of April, 1922, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Four Thousand and

no/100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Standard Forms Bureau Form 291.

HOTEL, APARTMENT, BOARDING AND LODGING HOUSE FORM.

(Building and Furniture and Fixtures).

- *1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for Hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.
- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glass ware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tool, implements and

utensils used in the business, and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On.....

*4. \$ Nil On.....

* No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

"Limitation on Amount Recoverable on One Article." Claim for loss on any one picture, piece of statuary, curiosity, or work of art, shall not exceed Two Hundred and Fifty (\$250) dollars, unless specifically insured.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 2 above, shall be adjusted with and payable to the insured named in this policy.

"Restriction in Case of Specific Insurance." No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to property of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

"Sidewalk Clause." It is understood that property above described is also covered under its respective items, on sidewalks, platforms, and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

Loss, if any, on building only, subject, however, to all the terms and conditions of this policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 54277 of the British & Federal Fire Underwriters Insurance Co. Agency at Pocatello, Idaho. Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent*.

FOR OTHER PROVISIONS SEE REVERSE SIDE OF THE RIDER.

Provisions Referred to in and made part of this rider. (No. 291).

"Permits". Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on or in same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflam-

mability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro-glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Standard Forms Bureau Form 371.

MORTGAGEE CLAUSE WITH FULL CONTRIBUTION.

(to be attached only to policies covering buildings.)

Loss or damage, if any, under this policy, on

buildings only, shall be payable to Fred J. Kiesel Estate, mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One.—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two.—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee, (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three.—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right, on like notice to cancel this agreement.

Condition Four.—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount

of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five.—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the property to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Attached to Policy No. 54277 of the British & Federal Fire Underwriters. Issued to Theo Enders. Agency at Pocatello, Idaho. Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent*.

Standard Forms Bureau Form 199.

ENDORSEMENT BLANK.

Endorsement dated April 29th, 1921. Agency at Pocatello, Idaho.

Attached to Policy No. 54277.

Issued to Theo Enders

Map Sheet...Block...No....Special Rate Page...

Line...O. P.....

Commencement of Policy/Expiration of Policy/
Amount insured/Old Rate/New Rate/Extra Premium/Return Premium.

The coverage of this policy shall not include the cost of foundations or excavations, and these items

shall not be considered in estimating the value of said building for any purpose under this policy.

WM. H. JACKSON, Jr., *Agent*.

THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Society shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to Be Stated in This Policy—This Policy is in a Stock Corporation.

IN WITNESS WHEREOF, this Society has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of the Society at Pocatello.

BRITISH & FEDERAL FIRE UNDER-
WRITERS of the Norwich Union Fire Insurance Society, Ltd.

by their Attorney,

J. L. Fuller, Manager of the Pacific Coast
Department.

Countersigned at Pocatello, Idaho, this 27th day of April, A. D. 1922.

WM. H. JACKSON, Jr., *Agent*.

"This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs," and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance,

whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process of judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom or trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels,

provided it be drawn and lamps filled by day light or at a distance not less than ten feet from artificial light); or if a building herein described whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This society shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in the neighboring premises: or (unless fire insured, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damages by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This society shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this society.

This policy may by a renewal be continued under the original stipulations, in consideration for premium for the renewed term, provided that any increase of hazard must be made known to this society at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the society by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this society retaining the customary short rate; except that when this policy is cancelled by this society by giving notice it shall retain only the pro rata premium.

If, with the consent of this society, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if re-

moved to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this society shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) liv-

ing nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this society all that remains of any property herein described, and submit to examinations under oath by any person named by this society, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this society or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall as above provided, be ascertained by two competent and disinterested appraisers, the insured and this society each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.

This society shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this society in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this society shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this society shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this society by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company, having special regulations, lawfully applicable to its organization, membership, policies or contract of insurance, such regulations shall apply to and form a part of this policy as the same may

be written or printed upon, attached, or appended hereto.

Endorsed, Filed May 22, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

(British & Federal Fire Underwriters Insurance Society, Defendant.)

No. 358.

AMENDMENT TO COMPLAINT.

VII-A.

On or about June 29, 1921, in the office of the defendant's adjustors, Croxford & Young at Salt Lake City, Utah, one W. H. Sherman, agent of this plaintiff, had a conversation with the defendant's adjustors, at which time he informed the said Young that the plaintiff had requested that he take up with said adjustors the matter of adjusting the loss occasioned by the fire aforesaid, and that at said time and place the said Young stated to the said W. H. Sherman that he, Young, had been to Soda Springs, Idaho, for the purpose of adjusting the loss by fire of the property covered by the said policy and that he had found, in inspecting the premises, that there was a total loss of the property so covered, whereupon, the said W. H. Sherman, in behalf of said plaintiff, asked the said Young what it was necessary for him to do as he was anxious to supply any information or reports desired or necessary, and that at said time the said

Young told him there was nothing at that time that could be done and that there was nothing that he wanted from the said Sherman or the plaintiff at that time, but that he was looking after the adjustment of the matter and would call upon the said Sherman and the plaintiff for such further information and reports as might be desired, and that the said Young thereafter did call upon said W. H. Sherman for certain information and reports, all of which were supplied as aforesaid.

That on the 19th day of August, 1921, defendant requested the plaintiff to make a sworn statement setting for the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property, a copy of all description and security of all policies, any change in the title, use, occupation or exposures of said property since the issuance of the same, by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; that pursuant to said request this plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted and retained without objection by the defendant, and that for many months thereafter

the defendant, through its agents and adjustors, continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff, written information and documents pertaining to plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, as amentioned in said policy, and that the said defendants, by its acts and conduct, as aforesaid, and by reason of the matters and things in this complaint alleged, has waived proof of loss as required in said policy and on account of its acts and conduct as aforesaid is estopped from setting up any defense on the grounds of failure to furnish proof as set forth in said policy.

Endorsed, Filed Oct. 14, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 358.

ANSWER.

Comes now the above named defendant and for its answer to the complaint of the plaintiff on file herein, admits, denies and alleges as follows, to-wit:

I.

Admits the corporate character and business of

the defendant, and that the defendant has been doing business and carrying on business in the State of Idaho, as alleged in paragraph 1 of said complaint.

II.

Answering paragraph 2 of said complaint, defendant denies any information or belief as to whether at any time or at all the plaintiff was the vendee of an executory contract entered into by the plaintiff with the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North one-half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) or of any other lot or lots whatever in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon or otherwise, or in any manner or at all; or whether the plaintiff at any time in any manner or at all had an insurable interest in a three (3) story frame building or the contents thereof, erected or situate on the said premises, last described, which said building was known as the "Idanha Hotel" at the time of its insurance or at the time of its destruction by fire as set forth in said complaint, or at any other time, or in any manner whatever or at all; and therefore, for the reason that the said defendant has no information or belief upon the said subject sufficient to enable it to answer said allegation of the complaint as above set forth, it so states in this manner, as above set forth, and denies the same on that ground.

III.

Answering paragraph 3 of said complaint this answering defendant admits that on the 27th day of April, 1921, in consideration of the payment by the plaintiff to the defendant of the sum of Two Hundred Twenty-six (\$226.00) dollars, the defendant delivered to the plaintiff its policy of insurance, a copy of which is attached to plaintiff's complaint marked "Exhibit A" and thereof made a part; which said policy of insurance was executed and attested by the defendant corporation by their Attorney, J. L. Fuller, Manager of the Pacific Coast Department, and it was expressly provided that the policy "shall not be valid unless countersigned by the duly authorized Agent of the Society at Pocatello."; that said policy was countersigned at Pocatello, Idaho, on the 27th day of April, A. D. 1921, by Wm. A. Jackson, Jr., Agent; that by the terms of said policy of insurance the defendant insured the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, until the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000) dollars upon the property described in the said policy as follows, to-wit:

- "*1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact there-

with, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.

- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tool, implements and utensils used in the business, and signs and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assured liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construc-

tion communicating and in contact therewith."

As set forth in the said policy of insurance upon the terms and conditions therein specified and not otherwise.

Admits that "Exhibit A" attached to the plaintiff's complaint is a correct copy of the policy of insurance.

Denies, except as hereinbefore specifically admitted, that the defendant by its Agent duly authorized thereto, executed or delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000.00) dollars upon a three-story, shingled roof frame building, occupied for hotel and apartment house purposes, situate on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures, and furnishing materials, silverware, crockery, glassware, supplies, provisions and fuel and all apparatus, or implements contained in said building; said building being insured in the amount of Three Thousand (\$3,000.00) dollars, and the furnishings and fixtures and etc., in the amount of One Thousand (\$1,000.00) dollars.

Denies that the said policy of insurance was executed by the defendant at Soda Springs, Idaho.

IV.

As to the allegations of paragraph 4 of said complaint, admits that no written application was made by the plaintiff to the defendant or its Agent, for the issuance of said insurance policy.

Denies that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property described, or at any other time, or before the issuance by defendant of insurance policy "Exhibit A" or at any other time specifically or otherwise advised or informed the agent of said defendant, to-wit: William H. Jackson, Jr., that the Natural Mineral Water Company had been the original owner of said property or that said Natural Mineral Water Company had sold the same to plaintiff, or that said Natural Mineral Water Company had placed a deed thereto in escrow in Soda Springs Bank, or that said deed or any deed had been placed in Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed.

Denies that plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear.

Denies that said Agent advised this plaintiff that he understood about the Natural Mineral Water Company or that it was included in the Fred J. Kiesel Estate, or that he would annex the clause in proper manner.

Denies that William H. Jackson, Jr., by whom said policy of insurance was countersigned, being policy attached to plaintiff's complaint and marked "Exhibit A" ever at any time or in any manner or at all, received any information whatever from said plaintiff that the Natural Mineral Water Company was the owner of the property or that there was any agreement whatever on the part of said William H. Jackson, Jr., agent as aforesaid, or otherwise, to insert in said policy any clause whatever, otherwise than appears in said policy, marked "Exhibit A".

Denies that in issuing said policy, said agent by mistake or inadvertance made the loss, if any, on the building therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustee as its interest might appear, or that there was any mistake or inadvertance whatever in making said loss on the building payable to the Fred J. Kiesel Estate, mortgagee or trustee; and this defendant avers that it has no information or belief upon the subject sufficient to enable it to answer the following allegation of the complaint, to-wit:

“that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same.”

And, therefore, defendant denies said allegation upon that ground.

V.

As to the allegations of paragraph 5 of said complaint, admits that on the 7th day of June, 1921, said hotel and apartment house, together with a portion of the furniture, fixtures, and furnishing material, silver, plat ware, china and glassware, and cutlery, supplies, provisions and fuel and certain utensils used in and about said business were partially destroyed by fire, but denies that the loss was total or that the cause of said fire was, or is unknown to the plaintiff.

VI.

Answering paragraph 6 of said complaint, this defendant denies that plaintiff's loss as a result of said partial destruction of the insured property described, was Twenty-five Thousand (\$25,000.00) dollars, or any other or greater sum than Twenty-five Hundred (\$2500) dollars.

VII.

Answering the allegations of paragraph 7, this defendant denies that immediately after the de-

struction of said insured property by fire, or at any other time whatever, or on the same date, the plaintiff notified William H. Jackson, Jr., alleged to have been at that time, the defendant's agent, of Pocatello, Idaho, of said loss by fire, or that thereafter, or within forty-eight (48) hours after June 7th, 1921, or at any other time, said William H. Jackson, Jr., notified the defendant herein, either by telegram or by written notice of the loss or destruction of the insured property; that in response to said notification given to defendant's agent by plaintiff, defendant sent its agent or adjustors to the scene, or the place of the said fire for the purpose of adjusting said loss, in any manner whatever, or at all.

Admits that certain representatives of the defendant went to Soda Springs, Idaho, and made some investigation into the loss and inspected the premises whereon the said property had stood, pursuant to, and in accordance with the terms and conditions of the policy of insurance, as follows, to-wit:

"This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received

by this society, including an award by appraisers when appraisal has been required."

Denies that said defendant, by sending any of its representatives or adjustors or agents to inspect said loss, waived any other or further notice or proof of loss by the plaintiff, or waived written proof of loss within sixty days as required by "Exhibit A" attached to plaintiff's complaint and thereof made a part.

Denies that the defendant at any time or in any manner whatever, sent any adjustor or agent or representative to adjust said loss or that the loss was a total loss; and in this connection this defendant avers the fact to be:

That on the 19th day of August, 1921, the defendant notified the plaintiff that in the event he made claim under said policy, sued on in this action, for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, that he was requested to comply with all of the terms and conditions of said insurance contract and his attention was particularly called to that portion of the same, recited in lines 70 to 76 inclusive, which was quoted in said notification and which said notification was sent by registered mail and duly received by said plaintiff, a copy of which is hereto attached and marked "Exhibit I", hereby referred to and hereof made a part; that there never was at any time or in any manner any waiver by

the defendant of the terms and conditions of said policy of insurance.

VIII.

As to the allegations of paragraph 8 of said complaint, this defendant admits that the plaintiff had:

“insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00, on said building and \$4,000.00 on the furniture and contents thereof.”

IX.

As to the allegations of paragraph 9 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

“That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.”

And, therefore, it denies the same on that ground.

X.

As to the allegations of paragraph 10 of said complaint, denies that the loss of said premises was a total loss or that no disagreement has been had between plaintiff and defendant as to the amount of the loss.

Admits that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant.

Admits that no appraisal of said loss has been required or requested by the defendant.

XI.

Answering the allegations of paragraph 11 of said complaint, this defendant admits that defendant has not paid said loss or any part thereof.

Denies that demand has been made for payment.

XII.

Answering the allegations of paragraph 12, this defendant denies that the plaintiff has performed all of the conditions of said policy "Exhibit A" on his part to be performed; and in this connection this defendant avers the fact to be:

That the plaintiff did not immediately after the fire give notice of any loss thereby in writing, to this defendant; did not protect the property from further damage; did not forthwith separate the damaged and undamaged personal property; did not put the same in the best possible order; did not make a complete inventory of the same stating the quantity and cost of each article and the amount claimed thereon; did not, within sixty days after the fire, render a statement to the defendant signed and sworn to by him stating the knowledge and belief of the plaintiff as to the time and origin

of the fire, the interest of the insured and all other persons in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not covering any of the said property and a copy of all of the descriptions, and schedules in all other policies, or any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of said policy of insurance; by whom and for what purpose the building described in said policy, and the several parts thereof, were occupied at the time of the fire; and in each and all of these respects he failed to comply with the terms and conditions of the policy on his part to be done and performed.

XIII.

Answering paragraph 13 this defendant admits that one year has not elapsed since the loss of said insured premises by fire, but, denies that the loss was total.

XIV.

Answering paragraph 14 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

“That this plaintiff is sometimes known as Theo Enders, and said insurance policy, “Exhibit A”, was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.”

And, therefore, denies the same on that ground.

FURTHER ANSWERING SAID COMPLAINT AND FOR A FIRST AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under the contract of insurance referred to in the plaintiff's complaint, and marked "Exhibit A" and thereof made a part, it was, among other things, provided:

"This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereon, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto or added hereto; conditions, provisions and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no officer, agent or other representative of this company shall have power to waive any provision or condition agreement of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions and agreements, no officer, agent or representative shall have such power or be deemed or held to have waived such conditions, provisions and agreements, unless such waiver, if any, shall be written upon or attached here-

to, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Also:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss."

That the plaintiff, on the 27th day of April, 1921, at the time of the issuance of said policy of insurance was not the owner of said real property described in said policy of insurance, nor did he have any insurable interest therein; nor was the said plaintiff, at the time of the fire, when the said property is alleged to have been destroyed, to-wit: On the 7th day of June, 1921, the owner of said property nor did he have any insurable interest therein; but the said real property stood in the name and was owned by the Natural Mineral Water Company, and the said Natural Mineral Water Company at said time was the owner of said property and the said plaintiff did not, at either of said times, have any right, title or interest therein or thereto.

II.

That said plaintiff at the time when the policy of insurance was issued, obtained and procured to be attached to said policy of insurance, the mortgagee clause set forth in said policy of insurance attached to plaintiff's complaint, in favor of the Fred J. Kiesel Estate, mortgagee, as its interests might appear, and had inserted in said policy the provision that the loss, if any, on building only, subject, however, to all of the terms and conditions of said policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

That later and on the 20th day of September, 1921, and after the said fire, the said plaintiff set forth and specified in a statement made by him to this defendant that the said Kiesel estate has and holds an interest in said property as security in the sum of about Fifty-four Hundred (\$5400) dollars, and that there were and are no other incumbrances thereon.

That the said plaintiff in the complaint filed in this action, in paragraph 4 of said complaint, sets forth and specifies that the said Fred J. Kiesel Estate was not the mortgagee or trustee of said property, and did not at that time nor has it at any time since the issuing of said policy, have any interest whatever, in or to said property; that by reason of the allegations of the said complaint there was and is a material misrepresentation in writing

as to a material fact and circumstance concerning this insurance and the subject thereof, and of the interest of the assured, in the property, and under the terms of the policy above quoted, the said policy is void and the plaintiff has no right to recover thereon.

FURTHER ANSWERING SAID COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE, this defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint marked "Exhibit A" and made a part thereof, it was, among other things, provided as follows, to-wit:

"If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy

of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property, since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; * * ”

Also:

“No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.”

That the said plaintiff did not immediately after the fire, on the 7th day of June, 1921, or at any other time give notice in writing to the defendant nor did he protect the property from further damage or forthwith separate the damaged from the undamaged property or put it in the best possible order; or make a complete inventory of same stating the quantity and cost of each article and the amount claimed thereon; nor did he, within sixty days after said fire, to-wit: within sixty days after June 7th, 1921, render a statement to said defendant signed and sworn to by said plaintiff stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon, all other insur-

ance whether valid or not, covering any of said property; a copy of all description and schedules of all policies; any change in the title, use, occupation or exposure of said property since the issuing of said policy; by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; nor did he furnish any of said items in any manner whatever or at all, or comply with any of the requirements of said clause and condition of said policy; nor was the same at any time extended in writing or otherwise by the defendant and by reason thereof, and the failure and neglect on the part of the plaintiff to comply with and perform the conditions of said policy as above set forth, said plaintiff was precluded from maintaining or sustaining in any court of equity this suit or any suit.

Further answering said complaint and by way of THIRD AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint, marked "Exhibit A" and thereof made a part, it was among other things provided:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * if the interest of

the insured be other than unconditional and sole ownership;”

That the ownership of the said plaintiff was not at the time of the issuance of the said policy, or at the time of the fire, sole or unconditional, but the said title to said real property described in the said policy of insurance was at all of said times in the Natural Mineral Water Company; and there was no agreement endorsed on said policy or added thereto relative to said ownership; and by reason thereof the said policy was and is void, and the plaintiff has no cause of action against this defendant.

Further answering said complaint and for a FOURTH AFFIRMATIVE DEFENSE, this defendant alleges:

I.

That under and by virtue of said insurance contract referred to in plaintiff's complaint and marked “Exhibit A” and thereof made a part, it was, among other things, provided:

“This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made

by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertainment or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described."

II.

That there was no ascertainment whatever of the actual cash value of the property at the time the loss occurred, nor was the same estimated in any manner whatever or attempted to be estimated; nor was there any appraisal of the same, nor any effort on the part of the plaintiff to have determined in any manner the actual loss, if any, sustained by the said fire; nor was the sum for which the defendant might or could be liable under the terms of the policy determined at any time whatever prior to the bringing of this suit either sixty days thereto or any other time, nor has there been any determination or estimate of the amount or value of the property alleged to have been de-

stroyed by fire prior to or at the time of the commencement of this suit.

Wherefore, and by reason of the said provisions of the policy above set forth and the failure and neglect of the plaintiff to conform to the terms thereof no cause of action exists in favor of the plaintiff and against the defendant at the time of the commencement of this suit or any subsequent time.

WHEREFORE, defendant having fully answered, prays to be dismissed with its costs in its behalf sustained.

WHITE & BENTLEY,
Pocatello, Idaho,

Attorneys for Defendant.

GEORGE F. SHELTON,

Butte, Montana,

of Counsel for Defendant.

(Duly verified.)

“EXHIBIT I”.

Croxford & Young
Adjusters of Fire Losses,
302-3 Ness Building.

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo. Enders,
Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 54277 of the British & Federal Fire Underwriters

of Norwich, England for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70 to 76 inclusive, reading as follows, to-wit:

“Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire.”

Yours truly,

BRITISH & FEDERAL FIRE UNDER-
WRITERS,

By Croxford & Young,
Adjusters.

Y/JHB

“Registered”

Endorsed, Filed Sept. 5, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

(Removed to U. S. District Court, District of Idaho)

THEODORE ENDERS,

Plaintiff,

vs.

COMMERCIAL UNION ASSURANCE CO.,
Ltd., a Corporation,

Defendant.

No. 359.

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of England; with its principal place of business at London, England; that said corporation is engaged in the business of accepting risks for loss or damage by fire, and is engaged in what is commonly known as the fire insurance business and is a fire insurance company; that said defendant has complied with the laws of the State of Idaho with reference to foreign corporations doing business in said state and is now, and at all times in this complaint mentioned has been doing business in the State of Idaho.

II.

That the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot

Five (5) and the North Half (N $\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three-story, frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned.

III.

That on the 27th day of April, 1921, at Soda Springs, Idaho, in consideration of the payment by the plaintiff to the defendant, of the premium of \$226.00, the defendant, by its agent, duly authorized thereto, executed and delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not exceeding \$4000.00, upon one three-story, shingle roof, frame building occupied for hotel and apartment purposes, situate on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures and furnishing material, silverware, crockery, glassware, supplies, provisions and fuel and all apparatus or implements contained in said building, said building being insured in the amount of \$3000.00 and the furniture, fixtures,

and etc., in the amount of \$1000.00, a copy of which policy is annexed hereto, marked Exhibit "A", and by this reference incorporated herein and made a part of this complaint and this paragraph, the same as if herein set out in full.

IV.

That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property heretofore described and before the issuance by defendant of its insurance policy, Exhibit "A", the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant's agent who issued and delivered said policy, Exhibit "A" to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear, and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included

in the Fred J. Kiesel estate and that he would annex the clause in proper manner; that in issuing said policy, as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the said building, therein insured, payable to the Fred J. Kiesel Estate, mortgagee or Trustee, as its interest might appear; that the Fred J. Kiesel Estate was not the mortgagee or Trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interest in the same.

V.

That on the 7th day of June, 1921, said hotel or apartment house, together with all of the furniture, fixtures, and furnishing materials, silver, plate ware, china and glassware, and cutlery, supplies, provisions and fuel, as described in said policy, and all utensils used in and about said business were totally destroyed by fire, the cause of which was and is unknown to plaintiff.

VI.

That plaintiff's loss as a result of said total destruction of the insured property heretofore described, was \$25,000.00.

VII.

That immediately after the destruction of said insured property by fire, and on the same day, the plaintiff notified Wm. H. Jackson, Jr., the defendant's agent, of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the total loss and destruction of the insured property by fire; that in response to said notification given to defendant's agent by this plaintiff, the defendant sent its agents and adjustors to the scene and place of said fire for the purpose of adjusting said loss; that said adjustors, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjustors, agents and representatives to inspect and adjust said loss, the loss being a total loss, the defendant waived any further notice and proof of loss by the plaintiff and waived written proof of loss within sixty days as required by Exhibit "A", annexed hereto.

VIII.

That the plaintiff had insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00,

being \$12,000.00 on said building and \$4,000.00 upon the furniture and contents thereof.

IX.

That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.

X.

That the loss of said premises was a total loss and that no disagreement has been had between plaintiff and defendant as to the amount of the loss thereof and that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant; and that no appraisal of said loss has been required or requested by defendant.

XI.

That the defendant has not paid the said loss nor any part thereof, demand having been made for payment.

XII.

That plaintiff has performed all of the conditions of said policy, Exhibit "A", on his part to be performed.

XIII.

That one year has not elapsed since the total loss of said insured premises by fire.

XIV.

That this plaintiff is sometimes known as Theo. Enders, and said insurance policy, Exhibit "A", was issued to Theo. Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.

WHEREFORE, plaintiff prays that he have and receive judgment of and from the defendant in the sum of \$4,000.00, together with interest thereon at 7% per annum from the 7th day of June, 1921, and for all costs of suit herein expended and for such other and further relief as to the Court may seem just and equitable.

STANDROD & STANDROD,

B. W. DAVIS,

Attorneys for Plaintiff.

Residing at Pocatello, Idaho.

(Duly verified.)

EXHIBIT "A"

STANDARD FIRE INSURANCE POLICY
Stock Company.

No. 8021950	Amount	\$4,000.00
	Rate	5.65
	Premium	266.00

COMMERCIAL UNION

Head office	Pacific Coast Branch
24-25 & 26 Cornhill,	558 Sacramento St.,
London, E. C.	San Francisco, Cal.

ASSURANCE COMPANY, LIMITED,
of London, England.

In consideration of the stipulations herein named and of Two hundred Twenty-six and no/100 Dollars, Premium, does insure Theo Enders for the term of One year from the twenty-seventh day of April, 1921, at noon, to the twenty-seventh day of April, 1922, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Four Thousand and no/100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Standard Forms Bureau Form 291.

HOTEL, APARTMENT, BOARDING AND
LODGING HOUSE FORM

(Building and furniture and fixtures).

- *1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationery heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.
- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical

instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tools, implements and utensils used in the business, and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On.....

*4. \$ Nil On.....

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceeding the item.

"Limitation on Amount Recoverable on One Article." Claims for loss on any one picture, piece of statuary, curiosity, or work of art, shall not exceed Two Hundred and Fifty (\$250.00) Dollars, unless specifically insured.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 2 above, shall be adjusted with and payable to the insured named in this policy.

"Restriction in Case of Specific Insurance." No article or piece of personal property separately insured for a specific amount under this, or any other

policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to property of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

"Sidewalk Clause." It is understood that property above described is also covered under its respective items, on sidewalks, platforms, and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

Loss, if any, on building only, subject, however, to all the terms and conditions of this policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 8021950 of the Commercial Union Assurance Co. Insurance Company, Agency at Pocatello, Idaho. Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent*.

FOR OTHER PROVISIONS SEE REVERSE
SIDE OF THIS RIDER.

Provisions Referred to in and made part of this rider. (No. 291).

"Permits." Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on or in same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the busi-

ness conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro-glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property, this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Standard Forms Bureau Form 371.

MORTGAGEE CLAUSE WITH FULL
CONTRIBUTION.

(to be attached only to policies covering buildings.)

Loss or damage, if any, under this policy, on buildings only, shall be payable to Fred J. Kiesel Estate, mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One—In case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall

then cease; and this company shall have the right, on like notice, to cancel this agreement.

Condition Four—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Attached to Policy No. 8021950 of the Commercial Union Assurance Co., Issued to Theo Enders.

Agency at Pocatello, Idaho, dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent*.

Standard Forms Bureau Form 199.

ENDORSEMENT BLANK.

Endorsement dated April 29th, 1921. Agency at Pocatello, Idaho.

Attached to Policy No. 8021950 of the Commercial Union Assurance Co.

Issued to Theo Enders.

Map Sheet.....Block.....No.....Special Rate
Page.... Line....O. P.....

Commencement of Policy/ Expiration of Policy/
Amount insured/ Old Rate/ New Rate/ Extra Pre-
mium/ Return Premium/

The coverage of this policy shall not include the cost of foundations or excavations, and those items shall not be considered in estimating the value of said building for any purpose under this policy.

WM. H. JACKSON, Jr., *Agent*.

THIS POLICY IS MADE AND ACCEPTED subject to the conditions, provisions and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no officer, agent or other representative of this Company shall have power to waive any condition or provision agreement of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions, and agreements, no officer, agent, or representative of this company shall have such power or be deemed or held to have waived any of such conditions, provisions, and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

THIS POLICY shall not be valid until countersigned by the duly authorized agent of the said Company at Pocatello, Idaho.

In Witness Whereof, this Company has executed and attested these presents.

COMMERCIAL UNION ASSURANCE
COMPANY, Limited, of London,
England.

By C. J. Holman,
Manager Pacific Coast Branch.

Countersigned at Pocatello, Idaho, this 27th day
of April, A. D. 1921.

WM. H. JACKSON, Jr., *Agent.*

CONDITIONS REFERRED TO IN BODY
OF CONTRACT.

This society company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on given notice, within thirty days after the receipt of the proof herein required, of its in-

tention so to do; but there can be no abandonment to this society of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership or if the subject of insurance be a building on ground not owned by the insured in fee-simple or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process of judgment or by volun-

tary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, bensole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by day light or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or becomes vacant or unoccupied and so remain for ten days.

This society shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in the neighboring premises; or (unless fire insures, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This society shall not be liable for loss to accounts, bills currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings,

bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific tools, apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, plan, survey, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this society.

This policy may by a renewal be continued under the original stipulations, in consideration for premium for the renewed term, provided that any increase of hazard must be made known to this society at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the society by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this society retaining the customary short rate; except that when this policy is cancelled by this society by giving notice it shall retain only the pro rata premium.

If, with the consent of this society, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the in-

terest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining, in the original location, shall, for the ensuing five days only, cover the property so removed to the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new location; but the society shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separating the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said prop-

erty; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this society all that remains of any property herein described, and submit to examinations under oath by any person named by this society, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this society or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this society each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the par-

ties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.

This society shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this society in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this society shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this society shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this society by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor un-

less commenced within twelve months next after the fire.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contract of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Endorsed, Filed May 22, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

(Commercial Union Assurance Company, Ltd.
Defendant.

No. 359.

AMENDMENT TO COMPLAINT. VII-A.

On or about June 29th, 1921, in the office of the defendant's adjustors, Croxford & Young, at Salt Lake City, Utah, one W. H. Sherman, agent of this plaintiff had a conversation with the defendant's adjustors, at which time he informed the said Young that the plaintiff had requested that he take up with said adjustors the matter of adjusting the loss occasioned by the fire aforesaid, and that at said time and place the said Young stated to the

said W. H. Sherman that he, Young, had been to Soda Springs, Idaho, for the purpose of adjusting the loss by fire of the property covered by the said policy and that he had found, in inspecting the premises, that there was a total loss of the property so covered, whereupon, the said W. H. Sherman in behalf of said plaintiff asked the said Young what it was necessary for him to do as he was anxious to supply any information or reports desired or necessary, and that at said time the said Young told him there was nothing at that time that could be done and that there was nothing that he wanted from the said Sherman or the plaintiff at that time, but that he was looking after the adjustment of the matter and would call upon the said Sherman and the plaintiff for such further information and reports as might be desired, and that the said Young thereafter did call upon the said W. H. Sherman for certain information and reports, all of which were supplied as aforesaid.

That on the 19th day of August, 1921, defendant requested the plaintiff to make a sworn statement setting forth the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and all other in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property, a copy of all description and

security of all policies, any change in the title, use, occupation or exposures of said property since the issuance of the same, by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; that pursuant to said request this plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted and retained without objection by the defendant, and that for many months thereafter the defendant, through its agents and adjustors continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff, written information and documents pertaining to plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, as mentioned in said policy, and that the said defendants by its acts and conduct, as aforesaid, and by reason of the matters and things in this complaint alleged, has waived proof of loss as required in said policy and on account of its acts and conduct as aforesaid is estopped from setting up any defense on the grounds of failure to furnish proof as set forth in said policy.

Endorsed, Filed Oct. 14, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 359.

ANSWER.

Comes now the above named defendant and for its answer to the complaint, of the plaintiff on file herein, admits, denies and alleges as follows, to-wit:

I.

Admits the corporate character and business of the defendant, and that the defendant has been doing business and carrying on business in the State of Idaho, as alleged in paragraph 1 of said complaint.

II.

Answering paragraph 2 of said complaint defendant denies any information or belief as to whether at any time or at all the plaintiff was the vendee of an executory contract entered into by the plaintiff with the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North One-half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) or of any other lot or lots whatever in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon or otherwise, or in any manner or at all; or whether the plaintiff at any time in any manner or at all had an insurable interest in a three (3) story frame building or the contents

thereof, erected or situate on the said premises last described, which said building was known as the "Idanha Hotel" at the time of its insurance or at the time of its destruction by fire as set forth in said complaint, or at any other time, or in any manner whatever or at all; and therefore, for the reason that the said defendant has no information or belief upon the said subject sufficient to enable it to answer said allegation of the complaint as above set forth, it so states in this manner, as above set fofrth, and denies the same on that ground.

III.

Answering paragraph 3 of said complaint this answering defendant admits that on the 27th day of April, 1921, in consideration of the payment by the plaintiff to the defendant of the sum of Two Hundred Twenty-six (\$226.00) dollars, the defendant delivered to the plaintiff its policy of insurance, a copy of which is attached to plaintiff's complaint and marked "Exhibit A" and thereof made a part; which said policy of insurance was executed and attested by the defendant corporation by C. J. Holman, Manager of Pacific Coast Branch, and it was expressly provided that the policy "shall not be valid until countersigned by the duly authorized agent of the said Company at Pocatello, Idaho.", that said policy was countersigned at Pocatello, Idaho, on the 27th day of April, A. D. 1921, by W. H. Jackson, Jr., Agent; that by the terms of said

policy of insurance the defendant insured the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, until the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000.00) dollars upon the property described in the said policy as follows, to-wit:

- *1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring, and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets in Soda Springs, Idaho.
- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments, mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, ap-

pliances and devices; tool, implements and utensils used in the business, and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assured liability therefor) this insurance shall also cover the personal property of the guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith."

As set forth in the said policy of insurance upon the terms and conditions therein specified and not otherwise.

Admits that "Exhibit A" attached to the plaintiff's complaint is a correct copy of the policy of insurance.

Denies, except as hereinbefore specifically admitted, that the defendant by its agent duly authorized thereto, executed or delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000.00) dollars upon a three-story, shingled roof frame building occupied for hotel and apartment house purposes, situate on the East side of

Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures, and furnishing materials, silverware, crockery, glassware, supplies, provisions and fuel and all apparatus, or implements contained in said building; said building being insured in the amount of Three Thousand (\$3,000.00) dollars and the furnishings, and fixtures and etc., in the amount of One Thousand (\$1,000.00) dollars.

Denies that the said policy of insurance was executed by the defendant at Soda Springs, Idaho.

IV.

As to the allegations of paragraph 4 of said complaint, admits that no written application was made by the plaintiff to the defendant or its agent, for the issuance of said insurance policy.

Denies that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property described, or at any other time, or before the issuance by defendant of insurance policy "Exhibit A" or at any other time specifically or otherwise advised or informed the agent of said defendant, to-wit: William H. Jackson, Jr., that the Natural Mineral Water Company had been the original owner of said property or that said Natural Mineral Water Company had placed a deed thereto in escrow in Soda Springs Bank, or that said Deed or any Deed

had been placed in Soda Springs Bank with instructions to said Bank that when the purchase price was paid in full that plaintiff should receive the deed.

Denies that plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear.

Denies that said agent advised this plaintiff that he understood about the Natural Mineral Water Company or that it was included in the Fred J. Kiesel Estate, or that he would annex the clause in proper manner.

Denies that William H. Jackson, Jr., by whom said policy of insurance was countersigned, being policy attached to plaintiff's complaint and marked "Exhibit A" ever at any time or in any manner or at all, received any information whatever from said plaintiff that the Natural Mineral Water Company was the owner of the property or that there was any agreement whatever on the part of the said William H. Jackson, Jr., agent as aforesaid, or otherwise, to insert in said policy any clause whatever, otherwise than appears in said policy, marked "Exhibit A".

Denies that in issuing said policy, said agent by mistake or inadvertance made the loss, if any, on the building therein insured, payable to the Fred

J. Kiesel Estate, mortgagee or trustee as its interest might appear, or that there was any mistake or inadvertance whatever in making said loss on the building payable to the Fred J. Kiesel Estate, mortgagee or trustee; and this defendant avers that it has no information or belief upon the subject sufficient to enable it to answer the following allegation of the complaint, to-wit:

“That the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same.”

And, therefore, defendant denies said allegation upon that ground.

V.

As to the allegations of paragraph 5 of said complaint, admits that on the 7th day of June, 1921, said hotel and apartment house, together with a portion of the furniture, fixtures, and furnishing materials, silver plate ware, china and glass-ware, and cutlery, supplies, provisions and fuel and certain utensils used in and about said business were partially destroyed by fire, but denies that the loss was total or that the cause of said fire was, or is unknown to the plaintiff.

VI.

Answering paragraph 6 of said complaint, this defendant denies that plaintiff's loss as a result of said partial destruction of the insured property described was Twenty-five Thousand (\$25,000.00) dollars, or any other or greater sum than Twenty-five Hundred (\$2500.00) dollars.

VII.

Answering the allegations of paragraph 7, this defendant denies that immediately after the destruction of said insured property by fire, or at any other time whatever, or on the same date, the plaintiff notified William H. Jackson, Jr., alleged to have been at that time, the defendant's agent, of Pocatello, Idaho, of said loss by fire, or that thereafter, or within forty-eight (48) hours after June 7th, 1921, or at any other time, said William H. Jackson, Jr., notified the defendant herein either by telegram or by written notice of the loss or destruction of the insured property; that in response to said notification given to defendant's agent by plaintiff, defendant sent its agent or adjustors to the scene, or the place of the said fire for the purpose of adjusting said loss in any manner whatever or at all.

Admits that certain representatives of the defendant went to Soda Springs, Idaho, and made some investigation into the loss and inspected the premises whereon the said property had stood, pur-

suant to, and in accordance with the terms and conditions of the policy of insurance, as follows, to-wit:

“This society shall not be held to have waived any provision or condition of this policy or and forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any communication herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.”

Denies that said defendant, by sending any of its representatives or adjustors or agents to inspect said loss, waived any other or further notice or proof of loss by the plaintiff, or waived written proof of loss within sixty days as required by “Exhibit A” attached to plaintiff’s complaint and thereof made a part.

Denies that the defendant at any time or in any manner whatever, sent any adjustor or agent or representative to adjust said loss or that the loss was a total loss; and in this connection this defendant avers the fact to be:

That on the 19th day of August, 1921, the defendant notified the plaintiff that in the event he made claim under said policy sued on in this action, for loss to the property insured under said policy, alleged to have been caused by fire of June 7th,

1921, that he was requested to comply with all of the conditions and terms of said insurance contract and his attention was particularly called to that portion of the same, recited in lines 70 to 76 inclusive, which was quoted in said notification and which said notification was sent by registered mail and duly received by said plaintiff, a copy of which is hereto attached and marked "Exhibit I", hereby referred to and hereof made a part; that there never was at any time or in any manner any waiver by the defendant of the terms and conditions of said policy of insurance.

VIII.

As to the allegations of paragraph 8 of said complaint, this defendant admits that the plaintiff had:

"Insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00 on said building and \$4,000.00 upon the furniture and contents thereof."

IX.

As to the allegations of paragraph 9 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

"That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged."

And therefore, it denies the same on that ground.

X.

As to the allegations of paragraph 10 of said complaint, denies that the loss of said premises was a total loss or that no disagreement has been had between plaintiff and defendant as to the amount of the loss.

Admits that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant.

Admits that no appraisal of said loss has been required or requested by the defendant.

XI.

Answering the allegations of paragraph 11 of said complaint, this defendant admits that defendant has not paid said loss or any part thereof.

Denies that demand has been made for payment.

XII.

Answering the allegations of paragraph 12, this defendant denies that the plaintiff has performed all of the conditions of said policy "Exhibit A" on his part to be performed; and in this connection avers the fact to be:

That the plaintiff did not immediately after the fire give notice of any loss thereby in writing, to this defendant; did not protect the property from further damage; did not forthwith separate the

damaged and undamaged personal property; did not put the same in the best possible order; did not make a complete inventory of the same stating the quantity and cost of each article and the amount claimed thereon; did not, within sixty days after the fire, render a statement to the defendant signed and sworn to by him stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and all other persons in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not covering any of the said property and a copy of all of the descriptions, and schedules in all other policies, or any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of said policy of insurance; by whom and for what purpose the building described in said policy, and the several parts thereof, were occupied at the time of the fire; and in each and all of these respects he failed to comply with the terms and conditions of the policy on his part to be done and performed.

XIII.

Answering paragraph 13 this defendant admits that one year has not elapsed since the loss of said insured premises by fire, but, denies that the loss was total.

XIV.

Answering paragraph 14 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

“That this plaintiff is sometimes known as Theo Enders, and said insurance policy, “Exhibit A”, was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person,”

And therefore, it denies the same on that ground.

FURTHER ANSWERING SAID COMPLAINT AND FOR A FIRST AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under the contract of insurance referred to in the plaintiff's complaint, and marked “Exhibit A” and hereof made a part, it was among other things, provided:

“This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; conditions, provisions and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two

hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no officer, agent or other representative of this company shall have power to waive any provision or condition agreement of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions and agreements, no officer, agent or representative shall have such power or be deemed or held to have waived such conditions, provisions and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Also:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss."

That the plaintiff, on the 27th day of April, 1921, at the time of the issuance of said policy of insurance was not the owner of said real property described in said policy of insurance, nor did he have any insurable interest therein; nor was the plaintiff, at the time of the fire, when the said prop-

erty is alleged to have been destroyed, to-wit: On the 7th day of June, 1921, the owner of said property nor did he have any insurable interest therein; but the said real property stood in the name and was owned by the Natural Mineral Water Company, and the said Natural Mineral Water Company at said time was the owner of said property and the said plaintiff did not, at either of said times, have any right, title or interest therein or thereto.

II.

That said plaintiff at the time when the policy of insurance was issued obtained and procured to be attached to said policy of insurance, the mortgagee clause set forth in said policy of insurance attached to plaintiff's complaint in favor of the Fred J. Kiesel Estate, mortgagee, as its interests might appear, and had inserted in said policy the provision that the loss, if any, on building only, subject, however, to all of the terms and conditions of said policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

That later and on the 20th day of September, 1921, and after the said fire, the said plaintiff set forth and specified in a statement made by him to this defendant that the said Kiesel estate has and holds an interest in said property as security in the sum of about Fifty-four Hundred (\$5400.00)

dollars, and that there were and are no other incumbrances thereon.

That the said plaintiff in the complaint filed in this action, in paragraph 4 of said complaint, sets forth and specified that the said Fred J. Kiesel Estate was not the mortgagee or trustee of said property, and did not at that time, nor has it at any time since the issuing of said policy, have any interest whatever, in or to said property! that by reason of the allegations of the said complaint there was and is a material misrepresentation in writing as to a material fact and circumstance concerning this insurance and the subject thereof, and of the interest of the assured, in the property, and under the terms of the policy above quoted, the said policy is void and the plaintiff has no right to recover thereon.

FURTHER ANSWERING SAID COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE, this defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint and marked "Exhibit A" and made a part thereof, it was, among other things, provided as follows, to-wit:

"If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from fur-

ther damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; * * *

Also:

“No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.”

That the said plaintiff did not immediately after the fire, on the 7th day of June, 1921, or at any other time give notice in writing to the defendant nor did he protect the property from further damage or forthwith separate the damaged from the undamaged property or put it in the best possible or-

der; or make a complete inventory of same stating the quantity and cost of each article and the amount claimed thereon; nor did he, within sixty days after said fire, to-wit: within sixty days after June 7th, 1921, render a statement to said defendant signed and sworn to by said plaintiff stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not, covering any of said property; a copy of all descriptions and schedules of all policies; any change in the title, use, occupation or exposures of said property since the issuing of said policy; by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; nor did he furnish any of said items in any manner whatever or at all, or comply with any of the requirements of said clause and condition of said policy; nor was the same at any time extended in writing or otherwise by the defendant and by reason thereof, and the failure and neglect on the part of the plaintiff to comply with and perform the conditions of said policy as above set forth, said plaintiff was precluded from maintaining or sustaining in any court of equity this suit or any suit.

Further answering said complaint and by way of THIRD AFFIRMATIVE DEFENSE this answering defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint, marked "Exhibit A" and thereof made a part, it was among other things provided:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * if the interest of the insured be other than unconditional and sole ownership:"

That the ownership of the said plaintiff was not at the time of the issuance of the said policy, or at the time of the fire, sole or unconditional but the said title to said real property described in the said policy of insurance was at all said times in the Natural Mineral Water Company and there was no agreement endorsed on said policy or added thereto relative to said ownership; and by reason thereof the said policy was and is void, and the plaintiff has no cause of action against this defendant.

Further answering said complaint and for a fourth affirmative defense this defendant alleges:

I.

That under and by virtue of said insurance contract referred to in plaintiff's complaint and

marked "Exhibit A" and thereof made a part, it was among other things, provided:

"This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all or any part of the articles at such ascertainment or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described."

II.

That there was no ascertainment whatever, of the actual cash value of the property at the time the loss occurred, nor was the same estimated in any manner whatever or attempted to be estimated;

nor was there any appraisalment of the same, nor any effort on the part of the plaintiff to have determined in any manner the actual loss, if any, sustained by the said fire; nor was the sum for which the defendant might or could be liable under the terms of the policy determined at any time whatever prior to the bringing of this suit either sixty days thereto or any other time, nor has there been any determination or estimate of the amount or value of the property alleged to have been destroyed by fire prior to or at the time of the commencement of this suit.

Wherefore, and by reason of the said provisions of the policy above set forth and the failure and neglect of the plaintiff to conform to the terms thereof no cause of action exists in favor of the plaintiff and against the defendant at the time of the commencement of this suit or any subsequent time.

WHEREFORE, defendant having fully answered, prays to be dismissed with its costs in its behalf sustained.

WHITE & BENTLEY,
Pocatello, Idaho,
Attorneys for Defendant.

GEORGE F. SHELTON,
Butte, Montana,
of Counsel for Defendant.

(Duly verified.)

"EXHIBIT I."

Croxford & Young,
Adjusters of Fire Losses,
320-3 Ness Building.

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo Enders,
Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 8-21950 of the Commercial Union Assurance Company of London for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70 to 75 inclusive, reading as follows, to-wit:

"Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several

parts thereof were occupied at the time of the fire."

Yours truly,

COMMERCIAL UNION ASSURANCE
COMPANY,

By
Adjusters.

Y/JHB

"Registered"

Endorsed, Filed Sept. 5, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Clerk.

(Removed to U. S. District Court, District of Idaho)

THEODORE ENDERS,

Plaintiff,

vs.

STAR INSURANCE COMPANY OF AMER-
ICA, a Corporation,

Defendant.

No. 360.

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York; with its principal place of business in New York City, New York; that said corporation is engaged in the business of accepting risks for loss or damage by fire, and is engaged in what is commonly known as the fire insurance busi-

ness and is a fire insurance company; that said defendant has complied with the laws of the State of Idaho with reference to foreign corporations doing business in said state and is now, and at all times in this complaint mentioned has been doing business in the State of Idaho.

II.

That the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and the North Half ($N\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) in the Village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three-story, frame building, and the contents thereof, erected and situate on the premises last described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned.

III.

That on the 27th day of April, 1921, at Soda Springs, Idaho, in consideration of the payment by the plaintiff to the defendant, of the premium of \$226.00, the defendant, by its agent, duly authorized thereto, executed and delivered to plaintiff its policy of insurance in writing insuring the plaintiff for the term of one year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922,

at noon, against all direct loss or damage by fire to an amount not exceeding \$4000.00, upon one three-story shingle roof, frame building occupied for hotel and apartment purposes, situate on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures and furnishing material, silver ware, crockery, glassware, supplies, provisions and fuel and all apparatus or implements contained in said building, said building being insured in the amount of \$3000.00 and the furniture, fixtures, and etc., in the amount of \$1000.00, a copy of which policy is annexed hereto, marked Exhibit "A", and by this reference incorporated herein and made a part of this complaint and this paragraph, the same as if herein set out in full.

IV.

That no written application was made by plaintiff herein to the defendant or its agents for the issuance of said Insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property heretofore described and before the issuance by defendant of its insurance policy, Exhibit "A", the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant's agent who issued and delivered said policy, Exhibit "A" to plaintiff, that the Natural Mineral Water Com-

pany had been the original owners of said property and had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear, and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included in the Fred J. Kiesel estate and that he would annex the clause in proper manner; that in issuing said policy, as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel Estate, moragagee or Trustee, as its interest might appear; that the Fred J. Kiesel Estate was not the mortgagee or Trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interest in the same.

V.

That on the 7th day of June, 1921, said hotel or apartment house, together with all of the furni-

ture, fixtures, and furnishing materials, silver, plate ware, china and glassware, and cutlery, supplies, provisions and fuel, as described in said policy, and all utensils used in and above said business were totally destroyed by fire, the cause of which was and is unknown to plaintiff.

VI.

That plaintiff's loss as a result of said total destruction of the insured property heretofore described was \$25,000.00.

VII.

That immediately after the destruction of said insured property by fire, and on the same day, the plaintiff notified Wm. H. Jackson, Jr., the defendant's agent, of Pocatello, Idaho, of said total loss by fire; that thereafter and within forty-eight hours after June 7th, 1921, said Wm. H. Jackson, Jr., notified the defendant herein by telegram and by written notice of the loss and destruction of the insured property by fire; that in response to said notification given to defendant's agent by this plaintiff, the defendant sent its agents and adjusters to the scene and place of said fire for the purpose of adjusting said loss; that said adjusters, agents and representatives of the defendant came to Soda Springs, Idaho, and investigated said loss and inspected the premises where the insured property had stood; that by the sending of adjusters, agents and representatives to inspect and adjust

said loss, the loss being a total loss, the defendant waived any further notice and proof of loss by the plaintiff and waived written proof of loss within sixty days as required by Exhibit "A", annexed hereto.

VIII.

That the plaintiff had insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00 on said building and \$4,000.00 upon the furniture and contents thereof.

IX.

That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.

X.

That the loss of said premises was a total loss and that no disagreement has been had between plaintiff and defendant as to the amount of the loss thereof and that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant; and that no appraisal of said loss has been required or requested by defendant.

XI.

That the defendant has not paid the said loss nor any part thereof, demand having been made for payment.

XII.

That plaintiff has performed all of the conditions of said policy, Exhibit "A", on his part to be performed.

XIII.

That one year has not elapsed since the total loss of said insured premises by fire.

XIV.

That this plaintiff is sometimes known as Theo Enders, and said insurance policy, Exhibit "A", was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.

WHEREFORE, plaintiff prays that he have and receive judgment of and from the defendant in the amount of \$4,00.00, together with interest thereon at 7% per annum from the 7th day of June, 1921, and for all costs of suit herein expended and for such other and further relief as to the Court may seem just and equitable.

STANDROD & STANDROD,
B. W. DAVIS,

Attorneys for Plaintiff.

Residing at Pocatello, Idaho.

(Duly verified.)

EXHIBIT "A"

STANDARD FIRE INSURANCE POLICY
Stock Company.

No. 28857	Amount	\$4000.00
	Rate	5.65

STAR INSURANCE COMPANY
of America.

Pacific Coast Department, 444 California
Street, San Francisco.

In consideration of the stipulations herein named and of.....Two hundred Twenty-six and no/100 ...Dollars. Premium, does insure Theo Enders... for the term of One year from the twenty-seventh day of April, 1921, at noon, to the twenty-seventh day of April, 1922, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Four Thousand and no/100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Standard Forms Bureau Form 291.

HOTEL, APARTMENT, BOARDING AND
LODGING HOUSE FORM.

(Building and Furniture and Fixtures).

- *1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and fres-

coes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for Hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.

- *2. \$1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glass ware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tool, implements and utensils used in the business, and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. \$ Nil On.....

*4. \$ Nil On.....

* No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

“Limitation on Amount Recoverable on One Article.” Claim for loss on any one picture, piece of statuary, curiosity, or work of art, shall not exceed Two Hundred and Fifty (\$250) dollars, unless specifically insured.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 2 above, shall be adjusted with and payable to the insured named in this policy.

“Restriction in Case of Specific Insurance.” No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to property of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

“Sidewalk Clause.” It is understood that property above described is also covered under its respective items, on sidewalks, platforms, and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

Loss, if any, on building only, subject, however, to all the terms and conditions of this policy, payable to Fred J. Kiesel Estate, mortgagee and assured.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 28857 of the Star Ins. Co., Insurance Company., Agency at Pocatello, Idaho, Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent.*

FOR OTHER PROVISIONS SEE REVERSE
SIDE OF THE RIDER.

Provisions Referred to in and made part of this rider. (No. 291).

“Permits”. Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on or in same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dynamite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro-glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specified permit therefor is attached to this policy.

“Lightning Clause.” This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term “lightning” and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the

sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

“Electrical Exemption Clause.” If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, excitors, lamps, motors, switches or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein whether artificial or natural.

Standard Forms Bureau Form 371.

MORTGAGEE CLAUSE WITH FULL CONTRIBUTION.

(to be attached only to policies covering buildings.)

Loss or damage, if any, under this policy, on buildings only, shall be payable to Fred J. Kiesel Estate, mortgagee (or Trustee) as interest may appear. Subject to all the terms and conditions hereinafter set forth in this rider, this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

Condition One.—In case the mortgagor or owner shall neglect to pay any premium due under this

policy, the mortgagee (or trustee) shall, on demand, pay the same.

Condition Two.—The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee, (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

Condition Three.—This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation, and shall then cease; and this company shall have the right, on like notice to cancel this agreement.

Condition Four.—In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

Condition Five.—Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the property to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest and shall thereupon receive a full assignment and trans-

fer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of its claim.

Attached to Policy No. 28857 of the Star Insurance Co., Issued to Theo Enders. Agency at Pocatello, Idaho. Dated April 27th, 1921.

WM. H. JACKSON, Jr., *Agent*.

Standard Forms Bureau Form 199.

ENDORSEMENT BLANK.

Endorsement dated April 29th, 1921. Agency at Pocatello, Idaho.

Attached to Policy No.

Issued to Theo Enders

Map Sheet...Block...No....Special Rate Page...
Line...O. P.....

Commencement of Policy/Expiration of Policy/
Amount insured/Old Rate/New Rate/Extra Premium/Return Premium.

The coverage of this policy shall not include the cost of foundations or excavations, and these items shall not be considered in estimating the value of said building for any purpose under this policy.

WM. H. JACKSON, Jr., *Agent*.

THIS POLICY IS MADE AND ACCEPTED subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Society shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the sub-

ject of agreement endorsed hereon or added hereto; and as to such conditions, provisions, no officer, agent, or representative shall have such power or be deemed or held to have waived such conditions, or provisions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Provisions Required by law to be stated in this Policy. This Policy is in a stock corporation.

In witness whereof, this company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of the Company.

STAR INSURANCE COMPANY OF
AMERICA,

Guy W. Earon, *President*.

J. B. Kremer, *Secretary*.

Countersigned at Pocatello, Idaho, this 27th day of April, 1921.

WM. H. JACKSON, Jr., *Agent*.

"This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs," and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and sat-

isfactory proof of the loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple or if the subject of insurance be personal property and be or become

incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of the insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom or trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by day light or at a distance not less than ten feet from artificial light); or if a building herein described whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This society shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in the neighboring premises: or (unless fire insured, and, in that event, for the dam-

age by fire only) by explosion of any kind, or lightning; but liability for direct damages by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This society shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this society.

This policy may by a renewal be continued under the original stipulations, in consideration for premium for the renewed term, provided that any increase of hazard must be made known to this society at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the society by giving five days' notice of such cancellation. If this policy

shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this society retaining the customary short rate; except that when this policy is cancelled by this society by giving notice it shall retain only the pro rata premium.

If, with the consent of this society, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this society shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order,

make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this society all that remains of any property herein described, and submit to examinations under oath by any person named by this society, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this society or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall as above provided, be ascertained by two competent and disinterested appraisers, the insured and this society each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisors together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by his society, including an award by appraisers when appraisal has been required.

This society shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this society in case of loss, may be provided for by agreement or condition written hereon or attached or appended thereto. Liability for re-insurance shall be as specifically agreed hereon.

If this society shall claim that the fire was caused by the act or neglect of any person or corporation,

private or municipal, this society shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this society by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Whenever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company, having special regulations, lawfully applicable to its organization, membership, policies or contract of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Endorsed, Filed May 22, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

(Star Insurance Company of America, Defendant).
No. 360.

VII-A.

AMENDMENT TO COMPLAINT.

On or about June 29, 1921, in the office of defendant's adjustors, Croxford & Young, at Salt Lake City, Utah, one W. H. Sherman, agent of this

plaintiff had a conversation with the defendant's adjustors, at which time he informed the said Young that the plaintiff had requested that he take up with said adjustors the matter of adjusting the loss occasioned by the fire aforesaid, and that at said time and place the said Young stated to the said W. H. Sherman that he, Young, had been to Soda Springs, Idaho, for the purpose of adjusting the loss by fire of the property covered by the said policy and that he had found, in inspecting the premises, that there was a total loss of the property so covered, whereupon, the said W. H. Sherman in behalf of said plaintiff asked that the said Young what it was necessary for him to do as he was anxious to supply any information or reports desired or necessary, and that at said time the said Young told him there was nothing at that time that could be done and that there was nothing he wanted from the said Sherman or the plaintiff at that time, but that he was looking after the adjustment of the matter and would call upon the said Sherman and the plaintiff for such further information and reports as might be desired, and that the said Young thereafter did call upon the said W. H. Sherman for certain information and reports, all of which were supplied as aforesaid.

That on the 19th day of August, 1921, defendant requested the plaintiff to make a sworn statement setting forth the knowledge and belief of the plain-

tiff as to the time and origin of the fire, the interest of the plaintiff and all others in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of said property, a copy of all description and security of all policies, any change in the title, use, occupation or exposures of said property since the issuance of the same, by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; that pursuant to said request this plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted and retained without objection by the defendant, and that for many months thereafter the defendant, through its agents and adjustors, continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff, written information and documents pertaining to plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, as mentioned in said policy, and that the said defendants, by its acts and conduct, as aforesaid, and by reason of the matters and things in this complaint alleged, has waived proof of loss as required in said policy and on ac-

count of its acts and conduct as aforesaid is estopped from setting up any defense on the grounds of failure to furnish proof as set forth in said policy.

Endorsed, Filed Oct. 14, 1922,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 360.

ANSWER.

Comes now the above named defendant and for its answer to the complaint of the plaintiff on file herein, admits, denies and alleges as follows, to-wit:

I.

Admits the corporate character and business of the defendant, and that the defendant has been doing business and carrying on business in the State of Idaho, as alleged in paragraph 1 of said complaint.

II.

Answering paragraph 2 of said complaint defendant denies any information or belief as to whether at any time or at all the plaintiff was the vendee of an executory contract entered into by the plaintiff with the Natural Mineral Water Company, a corporation, for the purchase of Lot Five (5) and

the North One-half ($\frac{1}{2}$) of Lot Four (4) in Block Thirty-eight (38) or of any other lot or lots whatever in the village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon or otherwise, or in any manner or at all; or whether the plaintiff at any time in any manner or at all had an insurable interest in a three (3) story frame building or the contents thereof, erected or situate on the said premises last described, which said building was known as the "Idanha Hotel" at the time of its insurance or at the time of the destruction by fire as set forth in said complaint, or at any other time, or in any manner whatever or at all; and therefore, for the reason that the said defendant has no information or belief upon the said subject sufficient to enable it to answer said allegation of the complaint as above set forth, it so states in this manner, as above set forth, and denies the same on that ground.

III.

Answering paragraph 3 of said complaint this answering defendant admits that on the 27th day of April, 1921, in consideration of the payment by the plaintiff to the defendant of the sum of Two Hundred Twenty-six (\$226.00) dollars, the defendant delivered to the plaintiff its policy of insurance, a copy of which is attached to plaintiff's complaint marked "Exhibit A" and thereof made a part; which said policy of insurance was executed and

attested by the defendant corporation by their President, Guy W. Earon, and Secretary, J. B. Kremer, and it was expressly provided that the policy "shall not be valid unless countersigned by the duly authorized Agent of the Company"; that said policy was countersigned at Pocatello, Idaho, on the 27th day of April, 1921, by W. H. Jackson, Jr., Agent; that by the terms of said policy of insurance the defendant insured the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, until the 37th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000.00) dollars upon the property described in the said policy as follows, to-wit:

"*1. \$3000.00 On the three-story shingle roof frame building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho.

- *2. 1000.00 On hotel or apartment or boarding or lodging house furniture, fixtures, and furnishing materials, useful and ornamental; musical instrumental, mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and apparatus, electrical apparatus, appliances and devices; tool, implements and utensils used in the business and signs; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor) this insurance shall also cover the personal property of guests in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith."

As set forth in the said policy of insurance upon the terms and conditions therein specified and not otherwise.

Admits that "Exhibit A" attached to the plaintiff's complaint is a correct copy of the policy of insurance.

Denies, except as hereinbefore specifically admitted, that the defendant by its agent duly authorized thereto, executed or delivered to plaintiff its

policy of insurance in writing insuring the plaintiff for the term of one (1) year from the 27th day of April, 1921, at noon, to the 27th day of April, 1922, at noon, against all direct loss or damage by fire to an amount not to exceed Four Thousand (\$4,000.00) dollars upon a three-story, shingled roof frame building, occupied for hotel and apartment purposes, situate in the East side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho; and the furniture, fixtures and furnishing material, silver ware, crockery, glassware, supplies, provisions and fuel and all apparatus, or implements contained in said building, said building being insured in the amount of Three Thousand (\$3,000.00) dollars, and the furnishings and fixtures and etc., in the amount of One Thousand (\$1,000.00) dollars.

Denies that the said policy of insurance was executed by the defendant at Soda Springs, Idaho.

IV.

As to the allegations of paragraph 4 of said complaint, admits that no written application was made by the plaintiff to the defendant or its Agent, for the issuance of said insurance policy.

Denies that the plaintiff at the time of the oral negotiations between plaintiff and defendant's agent for the insuring of the property described, or at any other time, or before the issuance by defendant of insurance policy "Exhibit A" or at any

other time specifically or otherwise advised or informed the agent of said defendant, to-wit: William H. Jackson, Jr., that the Natural Mineral Water Company had been the original owner of said property or that said Natural Mineral Water Company had sold the same to plaintiff, or that said Natural Mineral Water Company had placed a deed thereto in escrow in Soda Springs Bank, or that said deed or any deed had been placed in Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed.

Denies that plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear.

Denies that said Agent advised this plaintiff that he understood about the Natural Mineral Water Company or that it was included in the Fred J. Kiesel Estate, or that he would annex the clause in proper manner.

Denies that William H. Jackson, Jr., by whom said policy of insurance was countersigned, being policy attached to plaintiff's complaint and marked "Exhibit A" ever at any time or in any manner or at all, received any information whatever from said plaintiff that the Natural Mineral Water Company was the owner of the property or that there was any agreement whatever on the part of said Wil-

liam H. Jackson, Jr., agent as aforesaid, or otherwise, to insert in said policy any clause whatever, otherwise than appears in said policy, marked "Exhibit A".

Denies that in issuing said policy, said agent by mistake or inadvertance made the loss, if any, on the building therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustee as its interest might appear, or that there was any mistake or inadvertance whatever in making said loss on the building payable to the Fred J. Kiesel Estate, mortgagee or trustee; and this defendant avers that it has no information or belief upon the subject sufficient to enable it to answer the following allegation of the complaint, to-wit:

"that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party interested in the same."

And, therefore, defendant denies said allegation upon that ground.

V.

As to the allegations of paragraph 5 of said complaint, admits that on the 7th day of June, 1921, said hotel and apartment house, together with a portion of the furniture, fixtures, and furnishing

material, silver, plat ware, china and glassware, and cutlery, supplies, provisions and fuel and certain utensils used in and about said business were partially destroyed by fire, but denies that the loss was total or that the cause of said fire was, or is unknown to the plaintiff.

VI.

Answering paragraph 6 of said complaint, this defendant denies that plaintiff's loss as a result of said partial destruction of the insured property described, was Twenty-five Thousand (\$25,000.00) dollars, or any other or greater sum than Twenty-five Hundred (\$2500) dollars.

VII.

Answering the allegations of paragraph 7, this defendant denies that immediately after the destruction of said insured property by fire, or at any other time whatever, or on the same date, the plaintiff notified William H. Jackson, Jr., alleged to have been at that time, the defendant's agent, of Pocatello, Idaho, of said loss by fire, or that thereafter, or within forty-eight (48) hours after June 7th, 1921, or at any other time, said William H. Jackson, Jr., notified the defendant herein, either by telegram or by written notice of the loss or destruction of the insured property; that in response to said notification given to defendant's agent by plaintiff, defendant sent its agent or adjustors to the scene, or the place of the said fire for the pur-

pose of adjusting said loss, in any manner whatever, or at all.

Admits that certain representatives of the defendant went to Soda Springs, Idaho, and made some investigation into the loss and inspected the premises whereon the said property had stood, pursuant to, and in accordance with the terms and conditions of the policy of insurance, as follows, to-wit:

“This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.”

Denies that said defendant, by sending any of its representatives or adjustors or agents to inspect said loss, waived any other or further notice or proof of loss by the plaintiff, or waived written proof of loss within sixty days as required by “Exhibit A” attached to plaintiff’s complaint and thereof made a part.

Denies that the defendant at any time or in any manner whatever, sent any adjustor or agent or representative to adjust said loss or that the loss

was a total loss; and in this connection this defendant avers the fact to be:

That on the 19th day of August, 1921, the defendant notified the plaintiff that in the event he made claim under said policy, sued on in this action, for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, that he was requested to comply with all of the terms and conditions of said insurance contract and his attention was particularly called to that portion of the same, recited in lines 70 to 76 inclusive, which was quoted in said notification and which said notification was sent by registered mail and duly received by said plaintiff, a copy of which is hereto attached and marked "Exhibit I", hereby referred to and hereof made a part; that there never was at any time or in any manner any waiver by the defendant of the terms and conditions of said policy of insurance.

VIII.

As to the allegations of paragraph 8 of said complaint, this defendant admits that the plaintiff had:

"insured said building outside and in addition to the policy herein referred to, in the amount of \$12,000.00, that is to say, in a total amount including this policy of \$16,000.00, being \$12,000.00, on said building and \$4,000.00 on the furniture and contents thereof."

IX.

As to the allegations of paragraph 9 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

“That said building herein described was occupied as a hotel and apartment house at the time of its destruction by fire, as heretofore alleged.”

And, therefore, it denies the same on that ground.

X.

As to the allegations of paragraph 10 of said complaint, denies that the loss of said premises was a total loss or that no disagreement has been had between plaintiff and defendant as to the amount of the loss.

Admits that no appraisal of the loss or the appointment of parties to act as appraisers has been demanded by said defendant.

Admits that no appraisal of said loss has been required or requested by the defendant.

XI.

Answering the allegations of paragraph 11 of said complaint, this defendant admits that defendant has not paid said loss or any part thereof.

Denies that demand has been made for payment.

XII.

Answering the allegations of paragraph 12, this

defendant denies that the plaintiff has performed all of the conditions of said policy "Exhibit A" on his part to be performed; and in this connection this defendant avers the fact to be:

That the plaintiff did not immediately after the fire give notice of any loss thereby in writing, to this defendant; did not protect the property from further damage; did not forthwith separate the damaged and undamaged personal property; did not put the same in the best possible order; did not make a complete inventory of the same stating the quantity and cost of each article and the amount claimed thereon; did not, within sixty days after the fire, render a statement to the defendant signed and sworn to by him stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the insured and all other persons in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance whether valid or not covering any of the said property and a copy of all of the descriptions, and schedules in all other policies, or any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of said policy of insurance; by whom and for what purpose the building described in said policy, and the several parts thereof, were occupied at the time of the fire; and in each and all of these respects he failed to com-

ply with the terms and conditions of the policy on his part to be done and performed.

XIII.

Answering paragraph 13 this defendant admits that one year has not elapsed since the loss of said premises by fire, but, denies that the loss was total.

XIV.

Answering paragraph 14 of said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the following allegation:

“That this plaintiff is sometimes known as Theo Enders, and said insurance policy, “Exhibit A”, was issued to Theo Enders instead of Theodore Enders, but that Theodore Enders and Theo Enders are one and the same person.”

And, therefore, denies the same on that ground.

FURTHER ANSWERING SAID COMPLAINT AND FOR A FIRST AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under the contract of insurance referred to in the plaintiff's complaint, and marked “Exhibit A” and thereof made a part, it was, among other things, provided:

“This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions

printed on back hereon, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; conditions provisions and agreements not in conflict with law or contrary to public policy, contained on the first page hereof and those hereafter placed hereon, and to the conditions placed upon page two hereof, all of which said conditions, provisions and agreements are hereby specially referred to and made a part of this policy; and no officer, agent or other representative of this company shall have power to waive any provision or condition agreement of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such conditions, provisions and agreements, no officer, agent or representative shall have such power or be deemed or held to have waived such conditions, provisions and agreements, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Also:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after a loss."

That the plaintiff, on the 27th day of April, 1921, at the time of the issuance of said policy of insurance was not the owner of said real property described in said policy of insurance, nor did he have any insurable interest therein; nor was the said plaintiff, at the time of the fire, when the said property is alleged to have been destroyed, to-wit: On the 7th day of June, 1921, the owner of said property nor did he have any insurable interest therein; but the said real property stood in the name and was owned by the Natural Mineral Water Company, and the said Natural Mineral Water Company at said time was the owner of said property and the said plaintiff did not, at either of said times, have any right, title or interest thereon or thereto.

II.

That said plaintiff at the time when the policy of insurance was issued, obtained and procured to be attached to said policy of insurance, the mortgagee clause set forth in said policy of insurance attached to plaintiff's complaint, in favor of the Fred J. Kiesel Estate, mortgagee, as its interests might appear, and had inserted in said policy the provision that the loss, if any, on building only, subject, however, to all of the terms and conditions of said policy, payable to assured and Fred J. Kiesel Estate, mortgagee.

That later and on the 20th day of September, 1921, and after the said fire, the said plaintiff set forth and specified in a statement made by him to this defendant that the said Kiesel estate has and holds an interest in said property as security in the sum of about Fifty-four Hundred (\$5400) dollars, and that there were and are no other incumbrances thereon.

That the said plaintiff in the complaint filed in this action, in paragraph 4 of said complaint, sets forth and specifies that the said Fred J. Kiesel Estate was not the mortgagee or trustee of said property, and did not at that time nor has it at any time since the issuing of said policy, have any interest whatever, in or to said property; that by reason of the allegations of the said complaint there was and is a material misrepresentation in writing as to a material fact and circumstance concerning this insurance and the subject thereof, and of the interest of the assured, in the property, and under the terms of the policy above quoted, the said policy is void and the plaintiff has no right to recover thereon.

FURTHER ANSWERING SAID COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE, this defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint marked

“Exhibit A” and made a part thereof, it was, among other things, provided as follows, to-wit:

“If fire occur the insured shall immediately give notice of any loss thereby in writing to this society, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this society, shall render a statement to this society, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, or exposures of said property, since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire”;

Also:

“No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.”

That the said plaintiff did not immediately after the fire, on the 7th day of June, 1921, or at any other time give notice in writing to the defendant nor did he protect the property from further damage or forthwith separate the damaged from the undamaged property or put it in the best possible order; or make a complete inventory of same stating the quantity and cost of each article and the amount claimed thereon; nor did he, within sixty days after said fire, to-wit: within sixty days after June 7th, 1921, render a statement to said defendant signed and sworn to by said plaintiff stating the knowledge and belief of the plaintiff as to the time and origin of the fire, the interest of the plaintiff and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon, all other insurance whether valid or not, covering any of said property; a copy of all description and schedules of all policies; any change in the title, use, occupation or exposure of said property since the issuing of said policy; by whom and for what purpose the building described in said policy of insurance, and the several parts thereof, were occupied at the time of the fire; nor did he furnish any of said items in any manner whatever or at all, or comply with any of the requirements of said clause and condition of said policy; nor was the same at any time extended in writing or otherwise by the defendant and by reason thereof, and the failure and neg-

lect on the part of the plaintiff to comply with and perform the conditions of said policy as above set forth, said plaintiff was precluded from maintaining or sustaining in any court of equity this suit or any suit.

Further answering said complaint and by way of THIRD AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That under and by virtue of the contract of insurance referred to in plaintiff's complaint, marked "Exhibit A" and thereof made a part, it was among other things provided:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * if the interest of the insured be other than unconditional and sole ownership;"

That the ownership of the said plaintiff was not at the time of the issuance of the said policy, or at the time of the fire, sole or unconditional, but the said title to said real property described in the said policy of insurance was at all of said times in the Natural Mineral Water Company; and there was no agreement endorsed on said policy or added thereto relative to said ownership; and by reason thereof the said policy was and is void, and the plaintiff has no cause of action against this defendant.

Further answering said complaint and for a FOURTH AFFIRMATIVE DEFENSE, this defendant alleges:

I.

That under and by virtue of said insurance contract referred to in plaintiff's complaint and marked "Exhibit A" and thereof made a part, it was, among other things, provided:

"This society shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with property deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this society, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this society is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this society in accordance with the terms of this policy. It shall be optional, however, with this society to take all, or any part, of the articles at such ascertainment or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this society of the property described."

II.

That there was no ascertainment whatever of the actual cash value of the property at the time the loss occurred, nor was the same estimated in any manner whatever or attempted to be estimated; nor was there any appraisalment of the same, nor any effort on the part of the plaintiff to have determined in any manner the actual loss, if any, sustained by the said fire; nor was the sum for which the defendant might or could be liable under the terms of the policy determined at any time whatever prior to the bringing of this suit either sixty days thereto or any other time, nor has there been any determination or estimate of the amount or value of the property alleged to have been destroyed by fire prior to or at the time of the commencement of this suit.

Wherefore, and by reason of the said provisions of the policy above set forth and the failure and neglect of the plaintiff to conform to the terms thereof no cause of action exists in favor of the plaintiff and against the defendant at the time of the commencement of this suit or any subsequent time.

WHEREFORE, defendant having fully an-

swered, prays to be dismissed with its costs in its behalf sustained.

WHITE & BENTLEY,
Pocatello, Idaho,

Attorneys for Defendant.

GEORGE F. SHELTON,

Butte, Montana,

of Counsel for Defendant.

(Duly verified.)

“EXHIBIT I”.

Croxford & Young
Adjusters of Fire Losses,
302-3 Ness Building.

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo. Enders,
Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 28857 of the Star Insurance Company of New York for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70 to 76 inclusive, reading as follows, to-wit:

“Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item there-

of and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire."

Yours truly,
STAR INSURANCE COMPANY.
By Croxford & Young,
Adjusters.

Y/JHB

"Registered"

Endorsed, Filed Sept. 5, 1922.

W. D. McREYNOLDS, Clerk.

By Theo. J. Turner, Deputy.

At a stated term of the District Court of the United States for the District of Idaho, Eastern Division, held at Pocatello, Idaho, on October 14, 1922, the following proceedings, among others were had, to-wit:

Present:

HON. FRANK S. DIETRICH,

District Judge.

THEODORE ENDERS,

vs.

ALLIANCE INSURANCE CO., et al.,

Consolidated Nos. 357-358-359-360.

It was agreed by counsel and ordered that the cause of Theodore Enders vs. Alliance Insurance

Company, British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, Commercial Union Assurance Company, Ltd., and Star Insurance Company of America be, and they hereby are consolidated for the purpose of trial.

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

Appearances:

B. W. Davis, Esq., and T. D. Jones, Esq.,

For Plaintiff,

George F. Shelton, Esq., and Messrs. White
& Bentley,

For Defendants,

This cause came on for hearing before Hon. Frank S. Dietrich, Judge of the above-entitled Court, and a jury, this 14th day of October, 1922, whereupon the following proceedings were had, to-wit:

Counsel for plaintiff moved the Court for leave to amend their complaints in certain particulars.

THE COURT: Give me the data, and you can put it in form afterwards. Where are you going to claim that this alleged waiver took place?

MR. JONES: It took place, as I recall it, at Salt Lake City, in a conversation between Shearman, who was acting for Mr. Enders, and Mr. Young.

THE COURT: The adjuster?

MR. JONES: Yes.

THE COURT: That was in Salt Lake?

MR. JONES: In Salt Lake. I think it was in the office of Croxford & Young, in Salt Lake.

THE COURT: And about when?

MR. JONES: And this was a short time,—about the same day that he came back from the investigation of the condition of the property destroyed.

THE COURT: And it was oral, as I understand?

MR. JONES: Oral.

THE COURT: I think you would better state about what—approximately or substantially what it was, what was said then.

MR. JONES: As I recall—

THE COURT: Well, have you the man here now?

MR. JONES: Yes.

THE COURT: Perhaps you would better talk with him a moment and give us definitely what we are to—

MR. JONES: I think I can tell you in substance.

THE COURT: Very well.

MR. JONES: That Mr. Shearman told Mr. Young that he had come down at the request of Mr. Enders, who had asked him to take this matter up with him, to adjust the loss, or words to that effect, and that in this conversation he asked Mr. Young what the loss was, and he says, "It is a

total loss." "Well," he says, "I am representing Mr. Enders. Now if there is anything that you require us to do in this matter, we would be glad to do it." And he said, "There is nothing further for you to do until you hear from us or until you are further notified." He said, "We will furnish you any proofs you desire," that is, Mr. Shearman said, and he says, "Well, we will call upon you if we need anything further in the matter." And I am advised that Mr. Croxford was there with Young at the time, and this conversation was with both of them, and that they were both there, and possibly Mr. Shearman was talking as much or more to Mr. Croxford at that time as he was to Young, but Young was present at this conversation, and that he has talked subsequent to that time, and negotiations were carried on with Mr. Croxford.

THE COURT: But so far as the alleged waiver is concerned, you mean to say that it all took place either with or in the presence of Mr. Young, who is here?

MR. JONES: Yes, I think that is correct. He had numerous conferences, if the Court please, with these adjusters, but the question of waiver came up at that first, or acts and conduct and conversation that we claim amounted to waiver came up at that first conference, and they subsequently asked for other information, but the principal conversation took place at that first conference, and that was, we think, in the month of June.

THE COURT: At least that is the matter you rely upon,

MR. JONES: Yes.

MR. SHELTON: That is in the month of June?

MR. JONES: That is as I recall it. It was anyway before the expiration of the sixty-day period. If they will furnish us the time Mr. Young was over there looking at the building, we will furnish it now, because as we recall Mr. Young told Mr. Shearman at that time he had just come back from inspecting the condition of the fire.

MR. SHELTON: Do I understand you that Mr. Croxford was there at that time?

MR. JONES: I recall Mr. Shearman said he had the first conversation with Young, and Mr. Davis says that Croxford was there, but I wouldn't—

MR. DAVIS: His recollection is that he spoke to Croxford and Croxford said Young had the matter in charge.

MR. SHELTON: Well, it becomes important for us to know whether the conversation was with Mr. Young or Mr. Croxford. Mr. Croxford is not here, and Mr. Young is. We would like to know the date, if the Court please, and we would like to know specifically who were present, and what took place, because I think we are entitled to that.

MR. JONES: If Your Honor please, Mr. Shearman says he made no memorandum in writing of this, and his testimony naturally as he recalls it—

THE COURT: I don't know what his testimony is, Mr. Jones, and I want you simply to state what amendment you are going to make.

MR. JONES: The amendment we proposed, but he says he talked to both of these fellows, and the thing that is indefinite in his mind is as to whether or not he had all this conversation with one, or with both of them. He said when he first went down there—

THE COURT: No, that wouldn't be proper. The jurors are here, and I am not interested at all about that. The question is, what amendment do you propose to make?

MR. JONES: We propose to make the amendment we offered here.

THE COURT: I must deny that. You must make it something more specific. You are in a sense asking to add another issue, and counsel are entitled to know what you are going to show.

MR. JONES: I could dictate the amendment, but, as I stated, it is a little indefinite as to whether this conversation was entirely with Young. I will make it anyway.

That prior to the 7th day of August, 1921—

THE COURT: Can't you give about the date?

MR. JONES: Our best recollection is that it was before the 29th day of June, but another occurrence that happened at that time—say about the 29th day of June, 1921, Croxford & Young, the adjusters of the defendant—

MR. SHELTON: If the Court please, I would like to have it specified whether it was Mr. Young or Mr. Croxford.

MR. JONES: Possibly Croxford could be here.

THE COURT: Do you expect Mr. Croxford here this morning?

MR. SHELTON: No, Your Honor. He will not be here, because Mr. Young is the only one that had any information or knowledge with regard to this matter. Mr. Croxford has had nothing whatever to do with it.

MR. JONES: Do I understand from the Court that you want this dictated into the record exactly what it will be at this time, by a general statement?

THE COURT: If you will give me data I ask for, you can put it in form afterwards,—the time, the place, and the person making the waiver, and substantially what was said. What was the nature of it?

MR. JONES: The place was in Salt Lake City, in Croxford & Young's office, on or about the 29th day of June, 1921, and occurred in a conversation had by Mr. Shearman, representing Mr. Enders, in talking with Mr. Croxford first and then to Young, at which time, in the course of the conversation concerning the fire loss, Shearman advised the said adjusters that he was representing Mr. Enders, and that if there was any information or proof that he could furnish them or that they desired he was ready and anxious to do so, and that

it was stated to him at said time in substance or effect that they would call upon him if they needed—no, not at that time, there would be none, but they would call upon him when anything was required, and further that in a written communication with Jackson, the agent of the company, on or about the 14th day of June, 1921, in answer to a letter written to Mr. Jackson, Mr. Jackson, the local agent of the company, stated to Mr. Shearman that the adjusters were working on the loss and that they would probably want the policies within a short time, and that when they did they would let him know, and they would keep him advised as the case progressed, and that there was nothing that could be done at present.

I think that furnishes the information of the time and place, and the persons talked to, and what the substance of the conversation was, and with Croxford & Young, it not being definite as to whether all of it occurred with Young, we would not say. He knows he talked to both at that time, and that in his first talk,—I might say this to counsel,—he first spoke to Croxford, because he knew Croxford. Croxford told him Young had the case in charge. Young was in the office, and then he carried on this conversation with Mr. Young. That he later had numerous conversations with Mr. Croxford concerning this matter.

THE COURT: I think I will permit the amendment, on the condition, however, that you will agree

that if Mr. Croxford were present he would testify in substantially the same manner as Mr. Young will testify on the general subject.

MR. JONES: Yes, we will agree to that.

THE COURT: It being understood that Mr. Young is present and Mr. Croxford is not present in court.

MR. SHELTON: I may say, if the Court please, without any intention to quibble at all, that I am informed by Mr. Young that Mr. Croxford left Salt Lake on the 14th of May, prior to the fire, and went to Europe, and was gone until the middle or latter part of September, and that Mr. Croxford was never present at any of these conversations. I just state that as a matter of—

THE COURT: Well, you can show that later on. Let us proceed now, gentlemen.

MR. SHELTON: The amendment being made, I presume, if the Court please, it may be—

THE COURT: It will be deemed to be denied, yes, but at the noon hour you must put the amendment in proper form, and file it.

MR. SHELTON: It may take me a moment or two after that to controversy or deny the allegations.

THE COURT: I have the impression, gentlemen, that it is your desire to consolidate these four cases for trial.

MR. SHELTON: Your Honor, as I understand it, all the complaints are in the same language, and the answers are all identical.

THE COURT: I say, it is your desire to have them consolidated?

MR. JONES: Yes, Your Honor.

MR. SHELTON: Yes, I think they should be consolidated.

THE COURT: Very well. It may be so understood.

MR. DAVIS: May it please the Court, and gentlemen of the jury, I presume that all of the jurors heard the statement that I made to the jurors first called into the jury box, and I will not make any lengthy statement now.

We expect to prove by Mr. Enders that the Idanha hotel and the contents thereof, that he insured it and he paid his premiums, and it burned down, and he has done everything requested by the company, and that he hasn't been paid, and that the companies are liable. If we can prove these facts to you to your satisfaction, we will expect a verdict at your hands.

We will call Mr. Enders.

THEODORE ENDERS, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. DAVIS:

Q. You are the plaintiff in this case, Mr. Enders?

MR. SHELTON: If the Court please, at this time I desire to present an objection to the introduction of any evidence in this case, upon the ground that the complaint absolutely does not state a cause of action, and as I believe this to be a substantial objection, if the Court please, I will ask Your Honor to indulge me for a moment while I present the points upon which I desire to rely.

The complaint in this case, if the Court please, is based upon an insurance policy, and that is true of all of the cases, in which it is specifically set forth that there was insured the plaintiff in the case to the extent of each policy, of \$3,000 on the building and \$1,000 upon the contents thereof. There is also set forth in the policy of insurance a specific statement making the loss, if any, payable to the Kiesel Estate, Fred J. Kiesel Estate, as mortgagee, and there is a mortgage clause in the policy making the mortgagee the beneficiary to the extent of whatever right he had. The policy itself sued on therefore is a policy in favor of the plaintiff, with a mortgagee clause in favor of the Fred J. Kiesel Estate. And that is the contract which is attached to the complaint and made a part thereof. When it comes to filing his complaint in this case the plain-

tiff has failed to rely upon the contract as set forth and attached to his complaint, but says that the contract which he sues upon is not the contract upon which he relies to recover, and specifically sets forth that at the time when he applied for the policy of insurance upon this property he stated to the agent that the property itself was in the name of Natural Mineral Water Company, a corporation that held the legal title to the property, and he states further that the Fred J. Kiesel Estate was not a mortgagee at all, that it had no interest whatever in the particular property in question, and was not interested therein, and thereupon he states that the agent stated to him that he understood the character and nature of the title of the Natural Mineral Water Company and the nature of the title to the property, and he states further that the Fred J. Kiesel Estate was not a mortgagee at all, that it had no interest whatever in the particular property in question, and was not interested therein, and thereupon he states that the agent stated to him that he understood the character and nature of the title of the Natural Mineral Water Company and the nature of the title and claim of the Fred J. Kiesel Estate. Now our contention is in this case, if the Court please, that this being in the United States Court, where the distinction between law and equity is maintained and a suit at law cannot be heard upon the equity side of the Court, that they bring a suit at law upon a policy

of insurance which does not, according to the allegations of their complaint state the actual contract, that there is no cause of action stated whatever, and they have no right to proceed at law. The only remedy which they have, and the only basis upon which they can recover, is by an action to re-form the contract, in equity, and then, after the contract is re-formed by a court of equity, maintain their suit upon that contract.

Now, is the Court please, the authorities upon that point are clear enough. If the policy fails to express—

THE COURT: Before you get to your argument, I don't understand yet, Mr. Shelton, what your position is. Why aren't they suing on the policy? To whom does the policy run? I haven't seen the policy, and know nothing about it.

MR. SHELTON: The policy is attached to the complaint.

THE COURT: The suit is by Theodore Enders.

MR. SHELTON: The policy runs—If Your Honor will pardon me reading—

THE COURT: I have it. This is a copy, I suppose. The policy seems to run in favor of Theodore Enders, this one I have in my hand.

MR. SHELTON: The policy insures Theodore Enders for the term of one year,—describing the property. On the next page, "Loss, if any, on building only, subject, however, to all the terms and con-

ditions hereinafter set forth, payable to the assured and Fred J. Kiesel estate, mortgagee.”

THE COURT: Now it is alleged that the Fred J. Kiesel Estate hasn't any interest as mortgagee?

MR. SHELTON: It is now alleged that the Fred J. Kiesel Estate had no interest whatever as mortgagee, and never was a mortgagee of this property.

THE COURT: Is that your point? Is that the objection that you raise now?

MR. SHELTON: And the point which I present is that the contract which they are seeking to enforce here is not the contract upon which they sue. Enders is bringing suit upon a policy of insurance payable to himself and to a mortgagee.

THE COURT: As the mortgagee's interest appears.

MR. SHELTON: As the mortgagee's interest appears, and specifying a specific mortgagee clause authorizing the mortgagee to be paid, and authorizing a subrogation to the mortgagee's interest if the mortgagee is finally paid by the insurance.

THE COURT: The policy is primarily payable to the plaintiff, and if the mortgagee hasn't any interest then the insured may recover the whole, may he not?

MR. SHELTON: No.

THE COURT: Why not?

MR. SHELTON: The policy was made payable to the Fred J. Kiesel Estate as mortgagee, with the plaintiff. The policy which they say they should

have had was a policy made payable to the Natural Mineral Water Company, as the ultimate owner of the property, or person who had the ultimate title, and that the Fred J. Kiesel Estate had no interest whatever. Now they are seeking, if the Court please, to base their right to recover upon a policy which did not exist in fact. The decisions of the United States Court upon that point are clear, if the Court please.

THE COURT: I don't follow you. Before we get to the decisions,—you speak perhaps somewhat figuratively. They are suing upon a policy which you signed, are they not? They set that out and attach it.

MR. SHELTON: Yes.

THE COURT: Then why do you say they are not suing upon the policy as it is written?

MR. SHELTON: Just let me read to Your Honor the clause of the complaint—

THE COURT: First, if I understand you, you say that they are not suing upon the policy as written, because the Fred J. Kiesel Estate is not made a party, is that the idea?

MR. SHELTON: I beg Your Honor's pardon. I didn't understand.

THE COURT: What significance do you attach to the fact that there is a clause in favor of the mortgagee?

MR. SHELTON: That it is necessary that the moragagee should be paid, whatever his interest was.

THE COURT: But suppose he hasn't any interest.

MR. SHELTON: That is what they say; they say he hadn't any interest whatever and was not a mortgagee.

THE COURT: Then what right have you got to complain?

MR. SHELTON: Because if there was a policy of insurance payable to a mortgagee, then the mortgagee being paid to the extent of whatever his mortgage interest would be, the company would be subrogated to that interest and be allowed to credit against this—

THE COURT: I don't think I follow you yet. Suppose that you, as an owner of property, go to an agent and get insurance upon your property, and you have a moragtge upon your property, unfortunately, and it is the understanding between you and your creditor that the policy is to protect him, so that the ordinary mortgage clause goes in, and the policy is payable to the mortgagee as his interest appears. Now suppose that thereafter, and before the policy expires, you discharge your indebtedness and the mortgage is satisfied, and thereafter, during the life of the policy, your building is destroyed or injured by fire, do you mean that you can't sue on the policy?

MR. SHELTON: I mean you can't sue on that policy until that policy is re-formed in equity.

THE COURT: Yes. I would like to have your authorities upon that. That is so contrary to what I had supposed to be the law—

MR. SHELTON: Upon that point, if the Court please, if the policy fails to express the—

THE COURT: Oh, the general principal, I don't care for that. Have you any authority upon the general proposition which you have now stated?

MR. SHELTON: One of the recent cases in the Supreme Court is *Lumber Underwriters vs. Rife*, 237 U. S. 608.

THE COURT: Now what are the facts about it, briefly?

MR. SHELTON: Now in that case the Court said: "When by its written stipulation the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived."

THE COURT: Does this involve the question of the mortgage clause?

MR. SHELTON: No, Your Honor.

THE COURT: Then I don't care to hear it.

MR. SHELTON: That case was a different proposition, but it was the general principle that where a cause of action relies upon a specific docu-

ment, that there cannot be a waiver of the terms of that document and those terms ignored.

THE COURT: You need not argue that. That proposition will be assumed here. That is an elementary principle of law.

MR .SHELTON: An elementary principal of law. You can't sue upon a contract which has not, according to the terms of the complaint, any existence. If the contract was different in fact from the contract sued upon, then there is no right of recovery upon that contract, until it has been reformed according to the allegations of the complaint. A man has no right to come into Court, if the Court please—

THE COURT: But, Mr. Shelton, you keep insisting upon arguing a proposition of law which you may assume has been accepted by me. You may assume that the parties here must recover upon the contract as written. There is no use arguing that. It is an elementary principle. But I don't see its application to this case, if your only objection is that it contains a clause making the loss, if any, payable to the mortgagee as his interest appears and it is alleged that the mortgagee hasn't any interest. I may say to you that I assume this to be the law, and if I am incorrect in it I would be glad to have you call my attention to any decision holding the contrary, that if in such cases the owner of property, and mortgagor, buys insurance, and has the policy written in the owner's

name, but with the mortgagee clause, and that thereafter he pays the mortgagee, so that the mortgagee no longer has any interest, he, the insured, can recover the full amount of the policy up to, of course, the actual extent of the loss, that the mortgagee clause ceases to have any bearing, ceases to be of any force.

MR. SHELTON: But at the time when the policy was taken out the allegation is that there was a mortgage upon this property.

THE COURT: You say the allegation is that there was?

MR. SHELTON: That there was a mortgage upon this property.

THE COURT: Where is that allegation now?

MR. SHELTON: It is found in the—that is, it is set forth like this, paragraph 4 of the complaint: “That no written application was made by plaintiff herein to the defendant or its agents for the insurance of said insurance policy, but that the plaintiff at the time of the oral negotiations between plaintiff and defendant’s agent for the insuring of the property heretofore described and before the issuance by defendant of its insurance policy, Exhibit “A”, the plaintiff specifically advised and informed the agent of said defendant, one Wm. H. Jackson, Jr., he being the defendant’s agent who issued and delivered said policy, Exhibit “A” to plaintiff, that the Natural Mineral Water Company had been the original owners of said property and

had sold the same to plaintiff and placed a deed thereto in escrow in the Soda Springs Bank with instructions to said bank that when the purchase price was paid in full that plaintiff should receive the deed, and plaintiff advised said agent that he desired a clause in said policy making it payable to the Natural Mineral Water Company as their interest might appear, and that said agent advised this plaintiff that he understood about the Natural Mineral Water Company and that it was included in the Fred J. Kiesel estate and that he would annex the clause in proper manner; that in issuing said policy, as is shown therein, the said agent by mistake, or inadvertance, the exact reason being unknown to plaintiff, made the loss, if any, on the building, therein insured, payable to the Fred J. Kiesel Estate, mortgagee or trustee, as its interest might appear; that the Fred J. Kiesel Estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff, who is the only party in interest in the same."

There, if the Court please, is the allegation of the plaintiff's complaint upon which he stands, and we say until that policy is re-formed he cannot recover, for the reason that the policy which he sues on is not the contract which he made. That is our posi-

tion in the case, if the Court please, and we believe that it is correct.

THE COURT: The objection is overruled.

MR. SHELTON: Permit an exception.

MR. DAVIS: Q. You are the plaintiff in this action, Mr. Enders?

A. Yes, sir.

Q. Where do you live, Mr. Enders?

A. At Henry, Idaho.

Q. How long have you lived there?

A. Just this summer. I have been back and forth most of the time.

Q. Where were you living in June, 1921?

A. At Soda Springs.

Q. How long had you been living at Soda Springs?

A. About a year—two years, two years and—since '17.

Q. Yes. Are you familiar with lot 5 and the north half of lot 4 in block 38, in the village of Soda Springs, Caribou County?

A. Yes, sir.

Q. That is the land that the Idanha Hotel stood on?

A. Yes, sir.

Q. Who had been in possession of those lots and that building from about February first, 1918?

A. I had.

Q. Have you been in possession all of the time?

A. Yes, sir.

Q. Who has paid the taxes on that?

A. I have.

MR. SHELTON: Objected to as incompetent and irrelevant, if the Court please.

THE COURT: Why do you ask the question? I don't see how it is material as to who paid the taxes.

MR. DAVIS: Your Honor, we expect to show that he bought the property under oral negotiation first, and went into possession of the property. We are merely showing that he had had possession and had been paying the taxes thereon. We will connect that up.

THE COURT: Very well. I will let you make the showing. Of course you must show that you were the owner of the property within the terms of the policy.

MR. DAVIS: We appreciate that, Your Honor.

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have your negotiations with?

MR. SHELTON: Objected to, if the Court please, as incompetent. Oral evidence cannot be introduced at this time—

THE COURT: Overruled.

MR. DAVIS: Answer the question.

A. With the Natural Mineral Water company, through Fred J. Kiesen, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in '17.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.—I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

Q. Did you receive and letters from Mr. Kiesel with reference to that?

A. Yes, sir.

Q. (Showing paper to witness) Do you know what that is, Mr. Enders? Just state what it is.

A. This is a letter from Senator Clark to Mr. Kiesel, that he would accept four thousand dollars—

THE COURT: Well, don't give that.

MR. DAVIS: Q. Can't you just look at the letter closely now and tell what it is, Mr. Enders? You say it is a letter from Mr. Clark. It isn't a letter from Mr. Clark.

A. This is a letter from Fred J. Kiesel to me.

MR. DAVIS: We offer it in evidence as an exhibit.

THE COURT: You may have it marked now.
Said letter was marked

PLAINTIFF'S EXHIBIT NO. 1.

MR. DAVIS: And mark this as Plaintiff's Exhibit No. 2.

A certain letter was marked

PLAINTIFF'S EXHIBIT NO. 2.

MR. DAVIS: And this one 3.

A certain letter was marked

PLAINTIFF'S EXHIBIT NO. 3.

MR. DAVIS: Just another question, Mr. Enders.

Q. I call your attention to the envelope pinned to the exhibit. Is that the envelope that the letter was received in?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 1.

MR. SHELTON: These are negotiations, if the Court please, leading up to, as I understand it, the final transfer of the property, and I do not think they are material or relevant until we have been assured that there was some definite transfer of this property. It would be simply a negotiation.

THE COURT: Do you intend to show that there was a transfer of the property?

MR. DAVIS: Yes, Your Honor.

THE COURT: Very well. I will let them go in.

MR. DAVIS: Q. The envelope attached to Plaintiff's Exhibit No. 2, is the envelope that it was received in?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 2.

Q. The envelope attached to Plaintiff's Exhibit No. 3, is the envelope that that letter was received in, is it, Mr. Enders?

A. Yes, sir.

MR. DAVIS: I offer in evidence Plaintiff's Exhibit No. 3.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

MR. SHELTON: Objected to, if the Court please, as incompetent, irrelevant, and immaterial.

THE COURT: I assume that is preliminary. It won't be regarded as substantive proof of the purchase.

MR. DAVIS: If the Court please, due to the fact that Mr. Enders carried on these negotiations with Mr. Kiesel, who was an old friend of his, we expect to show that he bought it and the deed was put up in escrow, and he went into possession of the property.

THE COURT: Very well.

MR. SHELTON: If the Court please, I object until the deed is shown to have been put in escrow and an escrow agreement presented, and the nego-

tiation put in such shape that it gives him some definite title to that property, then there is no title in him upon which he has a right to maintain this suit.

THE COURT: That may be. I will hear you upon that a little later, when I know what the facts are. I can't see that it makes any difference which end of this proof you put in first.

MR. SHELTON: No, Your Honor. I am simply presenting my point.

THE COURT: Yes. I will hear you upon that later, when we come to the question of whether or not when this policy was written the insured had an insurable interest. You may proceed.

MR. DAVIS: Q. What were the terms of that purchase, Mr. Enders?

A. Four thousand dollars.

Q. When should it be paid?

A. Well, whenever I could. He wasn't going to work no hardship on me.

Q. Were you to pay interest on the amount?

A. Yes, sir.

Q. Was a deed prepared at the time?

MR. SHELTON: If the court please—

WITNESS: The deed was—

THE COURT: Just answer yes or no. Was the deed prepared? At what time?

MR. DAVIS: At the time of his negotiations in 1917, the latter part of the year.

A. The deed was not prepared at that time.

Q. Do you know why it was not prepared?

A. Because it took time. He had to take it up with Senator Clark to get that deed prepared.

Q. Was a deed later prepared?

A. Yes, sir.

Q. Where was that deed placed?

A. In the Soda Springs Bank.

Q. Is the deed there now?

A. Yes, sir, that is, the Soda Springs Bank moved into a larger bank, and Mr. Torgeson, he used to be the cashier of the Soda Springs bank, and then he moved up into Largellier's Bank.

Q. What was the agreement with reference to when the deed should be turned to you?

MR. SHELTON: That is entirely incompetent.

THE COURT: Sustained. I had supposed you would produce the deed and escrow agreement.

MR. JONES: If the Court please, the escrow agreement need not be in writing. This agreement was partly in letters and partly oral.

THE COURT: Where is the deed?

MR. JONES: The deed is here.

THE COURT: I think I will have to ask you to produce the deed.

MR. DAVIS: Yes. Perhaps we had better excuse Mr. Enders and—

THE COURT: Yes. You may stand aside for a moment, Mr. Enders.

JOSEPH T. TORGESON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 4.

DIRECT EXAMINATION.

By MR. DAVIS:

Q. State your name.

A. Joseph T. Torgesen.

Q. You live at Soda Springs, Mr. Torgesen?

A. Yes, sir.

Q. What is your occupation?

A. Cashier of the Bank of Soda Springs.

Q. I hand you Plaintiff's Exhibit No. 4, and ask you if you know what that is.

A. It is a deed to the Hotel Idanha property, from the Natural Mineral Water Company to Theodore Enders.

Q. In whose possession is the deed now?

A. It is being kept at Soda Springs, by the Bank of Soda Springs.

Q. You are with the Bank of Soda Springs?

A. Yes, sir.

Q. Is it in your charge?

A. Yes, sir.

Q. What are your instructions with reference to that deed, Mr. Torgensen?

MR. SHELTON: Those instructions, are they in writing?

A. The instructions are in writing.

MR. SHELTON: Where are those writings?

A. In my pocket. (Producing paper).

MR. DAVIS: Q. Are all of the instructions in writing, Mr. Torgesen?

A. All the instructions that I have from the party that submitted the deed to me are in writing, but I received other instructions later on from Mr. Enders, in connection with the deed.

THE COURT: From Mr. Enders, you say?

A. That is, instructions that were sent to me through Mr. Enders.

THE COURT: We will get at those one at a time.

MR. DAVIS: Just give me the other letter, Mr. Torgesen.

Witness produced paper, which was
marked PLAINTIFF'S EXHIBIT NO. 5.

MR. DAVIS: We offer in evidence, if the Court please, the deed, Plaintiff's Exhibit No. 4.

MR. SHELTON: We object to that, if the Court please, until the negotiations with regard to this matter, and the instructions—They are claiming there was a deed in escrow.

THE COURT: When does this instrument that you produce here as a deed, and now marked Plain-

tiff's Exhibit 4, when did it come into your possession or the possession of your bank?

A. I think it was in June, 1920.

THE COURT: You know that of your own knowledge, do you?

A. That is my recollection, yes, sir.

THE COURT: You were an officer of the bank at that time?

A. Yes, sir.

THE COURT: And was it delivered to you personally?

A. It came to me through the mails.

THE COURT: Accompanied by a letter?

A. Accompanied by a letter.

THE COURT: And is that one of the instruments which counsel holds in his hand?

A. One of those letters is the letter that accompanied the deed.

MR. DAVIS: Mark this.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 6.

THE COURT: And the letter now marked Exhibit 6?

A. Yes, sir.

THE COURT: And you then took possession of the deed pursuant to the request or instructions in that exhibit?

A. Yes, sir.

THE COURT: And have you had possession of it ever since?

A. Yes, sir.

THE COURT: I mean you or the bank?

A. Yes, sir.

THE COURT: The objection will be overruled. The deed may go in. You need not read it to the jury at present though. I would like to get this proof all in, and then I will hear you.

MR. SHELTON: Do I understand the letter goes in also?

THE COURT: It hasn't been offered yet. But of course it will have to go in if the deed is to be regarded as of any importance at all. You offer that letter now, do you?

MR. DAVIS: Yes, I am going to offer them. I have two letters, Your Honor.

THE COURT: Let us take one at a time. The one he identified which accompanied the deed.

MR. DAVIS: Q. Handing you Plaintiff's Exhibit 6, I will ask you if that is the letter that accompanied the deed when it came into your possession?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 6.

MR. SHELTON: That is Exhibit 6?

MR. DAVIS: Yes.

THE COURT: Have you another letter?

MR. DAVIS: I haven't offered that yet. I had it marked, five, first, because it bore a prior date.

Q. Handing you Plaintiff's Exhibit No. 5, when did you come into possession of that letter?

A. I came into possession of this letter about the time that I received the deed and the other letter. After I had notified Mr. Enders that I had this deed, then he gave me this letter, which was addressed to him.

MR. DAVIS: We offer Plaintiff's Exhibit No. 5.

THE COURT: Let me see the two letters, will you?

MR. DAVIS: (Handing papers to the judge) I had five marked ahead of six, because it bore a prior date.

THE COURT: Yes.

MR. DAVIS: Q. And you are still holding this deed in your possession under the two letters introduced and such instructions as you have?

A. Yes, sir.

Q. What are your final instructions, Mr. Torgesen, with reference to the delivery of this deed to Enders?

MR. SHELTON: If the Court please, that is incompetent and immaterial and irrelevant, oral testimony, in the face of letters which have been presented here, unless there are other letters.

THE COURT: Read the question.

(Question read).

THE COURT: Did you have any other instructions in writing, than such as are contained in these two letters that have been offered in evidence?

A. No, sir.

THE COURT: These aren't escrow agreements at all, of course, these letters.

MR. DAVIS: We are simply trying to show, the reason we tried to get at it with Mr. Enders, Your Honor, is that later, after this time, when Mr. Clark and Mr. Heslet, Mr. Clark was in Soda Springs, told Mr. Enders—

THE COURT: What was that question again?

(Question read).

THE COURT: I think the form of the question is somewhat objectionable. Now it appears that such instructions, if any, as he got thereafter, must have been oral. He says he hasn't anything else in writing.

MR. DAVIS: Yes, Your Honor.

THE COURT: Can't you follow it up in narrative form and find out what occurred, so far as he knows, relative to the deed, after June 14th, the date of this letter, Exhibit 6?

MR. DAVIS: I didn't understand the first of the—

THE COURT: Can't you follow it out historically or chronologically and find out what occurred,

so far as he knows, after receiving these letters, what occurred, if anything, with regard to the—

MR. DAVIS: Yes.

Q. After the receipt of these letters, Mr. Torgesen, what occurred then with reference to the deed—anything?

THE COURT: It is suggested in one of the letters, for instance, that you return the deed, after it is inspected by Mr. Enders. Why didn't you return the deed? Why didn't you return the deed to Mr. Clark or to the bank in Butte?

A. Because I was waiting for the deed to be passed upon by Mr. Enders' attorney.

THE COURT: Very well. Then what? Go on.

MR. DAVIS: Q. Was there any other reason why you didn't return the deed?

A. Not until later on, Mr. Enders came to me and said that Clark had told him that it was all right—

MR. SHELTON: I object to that as incompetent.

MR. DAVIS: We will have to prove that then with Mr. Enders first, because we can prove by Shearman—

THE COURT: You may go on.

A. Mr. Enders told me, after my asking him when they were going to inspect that deed so that I could return it to the bank at Butte, and he says Mr. Clark had told him to leave the deed there; and I never received any subsequent instructions from

the bank at Butte, so I figured it was all right to hold the deed.

Q. What did Mr. Enders tell you, what purpose the deed was to be left there for, with you?

MR. SHELTON: I object to that, if the Court please, as incompetent and irrelevant.

THE COURT: Sustained.

MR. DAVIS: Q. Do you remember an occasion thereafter, a month or so after you had the letter on June 14th, when Mr. Clark and Mr. Shearman and Mr. Heslet were in Soda Springs?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. How long was it after that that Mr. Enders told you that the deed was to be left there?

A. Well, it was just a matter of days. I couldn't tell you exactly, but just a few days, as near as I can recall.

MR. DAVIS: That is all. We will have to recall Mr. Enders.

THEODORE ENDERS, heretofore duly sworn in his own behalf, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Did I ask you if you knew why the deed wasn't placed with the bank in escrow in 1917, when you first made the deal?

MR. SHELTON: If the court please, I object to that as irrelevant.

THE COURT: Read the question.

(Question read)

A. The deal was made oral and it took time to get that deed.

THE COURT: Just a moment. The objection is sustained.

MR. DAVIS: Q. When did you tell me you went into possession of the building?

A. The first of February.

Q. What year?

A. In '18.

Q. 1918?

A. 1918.

Q. And have you made any improvements on the building since that time?

A. Yes, sir.

Q. What improvements have been made?

MR. SHELTON: I object to this, if the Court please, as immaterial.

THE COURT: Sustained. It may become material later on, but I don't think this is the logical way to get at the facts.

MR. DAVIS: Q. What was the understanding or agreement between yourself and Mr. Kiesel as to when the deed should be turned over to you, in writing or oral, as to when you should get it, in terms?

MR. SHELTON: If the Court please, that is immaterial and irrelevant. The understanding between himself and Mr. Kiesel doesn't base itself upon any authentic authority upon the part of Mr. Kiesel to act in the matter at all.

THE COURT: Sustained.

MR. DAVIS: We will call Mr. Enders off and prove that by Mr. Shearman, as to the officers of this corporation. If you will step down, Mr. Enders.

W. H. SHEARMAN, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Your name is W. H. Shearman?

A. Yes, sir.

Q. You live in Ogden?

A. I do.

Q. Were you acquainted with F. J. Kiesel in his lifetime?

A. I was.

Q. Have you any connection with his estate?

A. I am the manager of the Fred J. Kiesel estate.

Q. Did you know W. A. Clark?

A. I did.

Q. Did you know the officers of the Natural Mineral Water Company?

A. You mean did I know them, or did I know who they were?

Q. Did you know who they were?

A. I only knew they—

THE COURT: Just answer yes or no.

A. I can't.

THE COURT: Very well. Put it in your own way. You only knew what?

A. That Mr. Clark was vice president.

MR. DAVIS: Q. Did you know what connection Mr. Kiessel had with the Natural Mineral Water Company?

A. I knew he was a director.

Q. You know that he was a director?

A. Yes.

Q. You knew that W. A. Clark was the vice president?

A. Yes, sir.

THE COURT: At what time was this, sir?

MR. DAVIS: In December of this 1917 and the year 1918.

A. I don't know whether Mr. Clark was vice president then. I think he is now.

Q. Was Mr. Kiesel a member of the board of directors at that time?

A. Yes.

Q. He was?

A. Yes.

Q. Do you know where the books and papers of the Natural Mineral Water Company are?

A. I do not.

Q. Well, do you know whether or not they have been destroyed or lost?

A. I was told or have been told by Mr. Kiesel that the books were either misplaced or destroyed by a former secretary. I have never seen any of the books.

Q. Do you know the signatures here? Do you know Mr. Kiesel's signature?

A. Yes, sir.

Q. Do you know the other signatures?

A. Yes, sir.

Q. You do?

A. Mr. Nelson and Mr. Lindley.

MR. DAVIS: We ask that this be marked as Plaintiff's Exhibit.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 7.

Q. Do you know whether Mr. Nelson and Mr. Lindley were members of the board of directors of the Natural Mineral Water Company from 1917 down to the present time?

A. Only by the fact that they signed a certain resolution as directors.

Q. Well, do you know any other way that they were directors of the company?

A. No, I do not.

Q. You know that Mr. Kiesel was a director?

Y. Yes.

Q. At that time. Do you know who acted for the Natural Mineral Water Company in the transaction with Mr. Enders with reference to the disposal of the Idanha Hotel?

A. Mr. Kiesel, until his death, by and with the consent of Senator Clark.

Q. And are you familiar with the circumstance of the drawing of the deed that has been introduced in evidence here?

A. I am.

Q. Do you know at whose request that was drawn?

A. It was drawn at my request.

Q. And for what purpose?

MR. SHELTON: If the court please, that is entirely incompetent.

THE COURT: Sustained.

MR. DAVIS: Q. You say Senator Clark was acting for the company at that time, for the Natural Mineral Water Company?

A. At the time this deed was made?

Q. Yes.

A. He was.

Q. And Mr. Kisel had acted prior to Mr. Kiesel's death, in the negotiations with Mr. Enders?

A. Yes, sir.

Q. When did Mr. Kiesel die?

A. He died April 22, 1919.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 7, being a resolution from the directors of the Natural Mineral Water Company for the sale of the Idanha Hotel.

MR. SHELTON: Here is a resolution that doesn't purport to have any date, and doesn't appear to be authenticated. It isn't the resolution of the board of directors at all.

THE COURT: Let me see it.

MR. SHELTON: And apparently it has no significance except that it is signed by three individuals. We object to it on the ground that it is incompetent, irrelevant, and immaterial.

THE COURT: You don't know anything about this instrument personally, do you, sir?

A. No, sir.

THE COURT: The objection is sustained.

MR. DAIS: Q. Do you know when the instrument was drawn, Mr. Shearman?

A. I do not.

Q. When did it come into your possession?

A. I found it in looking through some old papers, I think in August of this year.

Q. In the files of the Kiesel—Mr. Kiesel's files?

A. Some old files in the office.

THE COURT: Office of what?

A. Of the Fred J. Kiesel estate I happened to be looking through.

MR. DAVIS: Q. Do you know what connection Mr. J. K. Heslet had with the Natural Mineral Water Company?

A. I do not.

Q. Did he have any?

A. I don't know whether he ever did or not.

Q. Do you know whether these men here, Mr. Nelson and Mr. Lindley, were acting in behalf of the Natural Mineral Water Company at any time?

A. Not of my own knowledge, I do not.

Q. Not of your own knowledge?

A. No.

Q. But you know that Mr. Kiesel was acting as a director and officer of the company, for the Natural Waters company, in these negotiations with Mr. Enders?

A. Only that he told me so.

Q. Well, you carried out those negotiations after he died?

MR. SHELTON: If the Court please, I object to this as incompetent.

THE COURT: Sustained.

MR. DAVIS: Q. What negotiations did you have with reference to the deed that has been introduced in evidence, at the time it was signed by the Natural Mineral Water Company?

A. Do you wish me to relate the entire—

Q. Yes.

A. After Mr. Kiesel's death I took charge of the estate, on November 15, 1919, and as soon there-

after as possible I took up with Mr. Enders the matter of completing the purchase of the hotel. He came down to the office—

THE COURT: That is now about what time, sir?

A. Now, Judge, I can't fix the date. It was after November 15, 1919.

THE COURT: Well, it was before what date? Give us the period during which it must have occurred. You say it was after November, 1919?

A. It was as soon thereafter as I could pay any attention at all, which must have been—

THE COURT: Was it within six months?

A. Oh, yes.

THE COURT: Very well.

A. Mr. Enders came to the office and said he was prepared to pay for the hotel if I would secure a deed for it. He said he knew that the title to the property was more or less impaired, but that he was willing to accept a quit claim deed from the company.

MR. SHELTON: I wish to object to this, if the Court please, upon the ground that it is incompetent and immaterial to the issues in this case.

THE COURT: It may turn out to be so, but I can't very well separate what is good from what is bad, at this time. He may go ahead.

A. (Continuing) That he was willing to accept a quit claim deed and straighten out the title him-

self. I than had our attorney, or I did it, I don't know which, draw a quit claim deed.

Q. Is that the deed produced in evidence?

A. I don't think that is the particular deed. And sent it to Mr. Clark, telling him that as far as I knew he was the only living officer of the Natural Mineral Water Company, and that Mr. Enders would accept his signature for the company. And Mr. Clarke wrote me that he had received the deed, but that he didn't wish to sign it until—

MR. SHELTON: Just a moment. Mr. Clark wrote you a letter?

A. Yes, sir.

MR. SHELTON: Have you got the letter?

A. I think I have.

MR. DAVIS: We ask that this be marked as a plaintiff's exhibit.

Said paper was marked:

PLAINTIFF'S EXHIBIT NO. 8.

Q. Handing you Plaintiff's Exhibit No. 8, I will ask you if that is the letter you refer to, Mr. Shearman?

A. That is the letter.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 8.

MR. SHELTON: My objection to all of this, if the Court please, is that it is incompetent, irrelevant, and immaterial, and it is going in, I presume, under the—

THE COURT: Yes. I will let it go in and consider the general subject later on.

MR. DAVIS: Now go ahead, Mr. Shearman.

A. This letter from Mr. Clark said,—or acknowledged receipt of the deed from me.

MR. SHELTON: Well, the letter will speak for itself, of course.

THE COURT: Let me see the letter. After you got this letter, go on from them. Don't give the contents of the letter. Just go on and state what you did after you got the letter.

MR. DAVIS: What occurred?

A. I did nothing after that.

Q. What occurred after that?

A. Mr. Clark—this is merely hearsay, except what Mr. Heslet told me occurred.

THE COURT: You need not state that.

MR. DAVIS: Q. When did you next see Mr. Clark and Mr. Enders after that, that is, when did you see them together at Soda Springs after that?

A. The summer of 1920, I think. I don't remember the date.

Q. You were there together, you and Mr. Clark and Mr. Heslet?

A. And Mr. Enders.

Q. Who is Mr. Heslet?

A. Mr. Heslet represents Mr. Clark's interests, and is assistant cashier or cashier of his bank in Butte,—W. A. Clark.

Q. He was there at Soda Springs as Mr. Clark's secretary, or something of that kind?

A. Mr. Clark had his secretary also.

Q. And had Mr. Heslet?

A. He had Mr. Heslet with him.

Q. Was there any negotiations with reference to the deed at that time, or was the deed mentioned between Mr. Clark and Mr. Enders?

A. Yes.

Q. What was that?

MR. SHELTON: If the Court please, my objection to this, that it is entirely incompetent and immaterial to the issues in this case.

THE COURT: Overruled.

A. Mr. Clark and Mr. Heslet and I talked with Mr. Enders about this deed, I mean about closing the transaction, and Mr. Enders—I can't remember all that was said, but Mr. Enders requested that the deed be left in Soda Springs, and Mr. Clark said he had no objections to that at all.

Q. Be left where in Soda Springs?

A. I understood at the time it was in escrow at the Bank of Soda Springs. I never saw the deed or the instructions. I merely understood it was in escrow at the Bank of Soda Springs.

Q. At that talk was there anything said between Mr. Clark and Mr. Enders as to when Mr. Enders should receive the deed?

A. No, I think not.

Q. Handing you the deed, Plaintiff's Exhibit

No. 4, I will ask you if you know whose signature that is there as president of the Natural Mineral Water Company?

THE COURT: You don't raise any question as to that, do you?

MR. SHELTON: Oh, no.

THE COURT: That is, it seems to be properly executed and properly acknowledged.

MR. DAVIS: Yes. I thought he was trying to claim that Clark had no authority to act.

Q. Now was there any other occurrences up to that point with reference to this transaction, the putting of the deed up, that you know about?

A. I think not. I think that is all I had to do with it, except that I do know that Mr. Clark did not sign the original deed, but had another deed prepared, and sent it to Mr. Heslet.

Q. Do you know whether or not a deed was sent to Mr. Clark in the first instance back in 1917, before Mr. Kiesel died?

MR. SHELTON: I didn't get you.

MR. DAVIS: The facts we are trying to get at are these. I don't know that it is material. There was a deed, as shown by the correspondence, prepared and sent to Mr. Clark to sign, in 1917, but they couldn't get hold of him, and Mr. Kiesel and Mr. Enders were friends, and that deed wasn't put up, as the agreement was, and it was after Mr. Kiesel died that this man came in and got hold of Mr. Clark and got it put up in the bank.

MR. SHELTON: I think that is immaterial, if the Court please.

THE COURT: You may ask him if he knows.

MR. DAVIS: Q. Do you know anything about a deed having been sent to him in the first instance?

A. Merely by searching the correspondence. I know nothing of my own personal knowledge.

Q. But you have the correspondence in your possession?

A. I think so.

Q. Showing that—

THE COURT: No; that would be the contents. You can show the correspondence.

We will take a recess until two o'clock. Gentlemen of the jury, be careful not to enter into any discussion concerning this case or overhear any discussion of it. Keep yourselves entirely aloof from any outside influences. Return at two o'clock this afternoon.

An adjournment was thereupon taken until 2 P. M. of this date, Saturday, October 15, 1922.

2 P. M., Saturday, Oct. 15, 1922.

W. H. SHEARMAN, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION—(Continued)

By MR. DAVIS:

Q. Mr. Shearman, do you know where the prin-

cial office of the Natural Mineral Water Company was, and where their business was conducted, from the middle of the year 1917 up until the time of Mr. Kiesel's death in about April, 1919?

A. Yes; in the office of the Fred J. Kiesel Company, in Ogden, Utah.

Q. Do you know who was the managing head and agent of the Natural Mineral Water Company, and who was conducting and doing their business at that time?

A. Yes, sir;—Fred J. Kiesel.

MR. SHELTON: If the Court please, this is incompetent. The best evidence, of course, is the articles of incorporation and the proceedings in that respect.

THE COURT: How do you know that, sir?

A. I went to Ogden in March, 1917, and was partly connected with Mr. Kiesel during that time, and was also at divers times in said office, and he told me all about this sale—

THE COURT: No. You yourself were not employed by the company, the Natural Water Company?

A. No, sir.

THE COURT: You never attended any of its meetings?

A. No, sir.

THE COURT: The objection is sustained. The answer will be stricken out.

MR. DAVIS: Q. Did the company have any meetings during that time, that you know of?

A. Not that I know of.

Q. Did they have any meetings at Ogden at that time, during that time?

A. Not that I know of.

Q. Well, do you know whether they did have meetings?

THE COURT: How could he know whether they had any meetings or not? He wasn't connected with the company in any way.

MR. DAVIS: Q. Do you know where the books of the company were kept?

A. I think I said this morning that the original books and records of the company were either destroyed or misplaced. All the accounts of the Natural Mineral Water Company—

THE COURT: All you know about that is what somebody told you?

A. No, sir; I know of my own knowledge.

THE COURT: You saw the books?

A. Yes, sir.

THE COURT: Very well.

A. The accounts of the Natural Mineral Water Company were kept upon the books of the Fred J. Kiesel Company until that company was dissolved, and since that time upon the books of the Fred J. Kiesel estate. All moneys coming in to the company were credited to the Natural Mineral Water Company upon those books, and any payments made

for the company were charged to the company on those books.

MR. DAVIS: Q. In 1917, from that time on until Mr. Kiesel's death, were you in the employ of Mr. Kiesel?

A. Partly.

Q. And while you were in his employ did you have access to those books, and did you have occasion to see the books and go over them?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Now, do you know, from what you have seen of the books yourself, not from what Mr. Kiesel told you, who was acting as the managing head and who was doing the business for the Natural Mineral Water Company during that time?

MR. SHELTON: Just a minute, if the Court please. I object to this as incompetent. The witness is not competent to testify in regard to any matter connected with the Mineral Water Company. If the books of the concern were in existence the books are the best evidence, and if the books are not in existence, or if there are any accounts, those accounts would be incompetent as evidence until it was shown that they were kept by some person authorized to do so.

THE COURT: Sustained.

MR. DAVIS: Q. Who has transacted the business for the Natural Mineral Water Company as

the acting secretary of the company since Mr. Kiesel's death?

A. I have.

MR. SHELTON: I object to this, if the Court please, as incompetent,—the same grounds that I have stated.

THE COURT: I think if you are going into this at all you ought to inquire as to the facts, rather than the opinion or conclusion of the witness.

MR. DAVIS: Q. What have you done personally since Mr. Kiesel's death with reference to attending to the affairs or business of the Natural Mineral Water Company?

MR. SHELTON: Objected to as immaterial, if the Court please.

THE COURT: Well, if you have done anything, sir, by what authority have you done it, first?

A. Well, I suppose I have had no authority. I have had it all to tend to, and merely assumed it after Mr. Kiesel's death, and have attended to it. I have collected all the rents and paid all the expenses, and attended to all the affairs of the company.

THE COURT: Did it have any property other than this hotel property?

A. No. The only income they have is the rental of water to the Oregon Short Line Railroad Company. Those checks come to me each month, and I endorse them as acting secretary, and put them to

the credit of the company. And whatever expenses there are in connection with the company, taxes and—

THE COURT: That is rent for what?

A. For the water.

THE COURT: How much does that amount to?

A. Forty dollars a month.

THE COURT: That is the only matter in which you have acted for the Natural Water Company?

A. No. I have sold various small things around the plant, bottles, and any little items that came up. I have also arranged for taking care of the property, in fact, all the little matters that come up I attend to.

THE COURT: Do you report to anybody?

A. Nothing except a statement, and of course—

THE COURT: A statement to whom?

A. I mean of the receipts and expenditures; when Mr. Clark wants a statement I send him one. If anything of importance comes up, like the preparing of this deed, of course I communicate with Mr. Clark.

MR. DAVIS: Q. You communicate with Mr. Clark as who? How do you address Mr. Clark in these communications?

MR. SHELTON: That I object to, if the Court please, as incompetent. The witness don't show any authority.

THE COURT: Objection sustained.

MR. DAVIS: Q. What property has the Natural Mineral Water Company now?

MR. SHELTON: I object to that. The witness has not shown—

THE COURT: I can't see that that is material, even though he were competent to answer. I hardly see how he would be competent, but assuming that he is competent, I can't see that it is material.

MR. DAVIS: Q. Did I ask you if you knew what connection Mr. W. A. Clark had with the Natural Mineral Water Company, what office he held?

MR. SHELTON: I object to this, if the Court please, on the same ground, as incompetent and immaterial.

THE COURT: Sustained.

MR. DAVIS: Q. Were you present at Soda Springs on or about the 20th of July, 1920, when W. A. Clark was there?

A. I was.

Q. Was the W. A. Clark you refer to the same W. A. Clark that signed the deed, Plaintiff's Exhibit No. 4, in evidence here?

A. Yes, sir.

MR. SHELTON: I object to that, if the Court please, as immaterial and incompetent.

THE COURT: Overruled.

MR. DAVIS: Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to the negotiations for any escrow

agreement between the Natural Mineral Water Company and Theodore Enders?

MR. SHELTON: Objected to as incompetent and immaterial.

THE COURT: Overruled. You may answer yes or no.

A. Yes.

MR. DAVIS: Q. What was that, will you state?

MR. SHELTON: I object.

THE COURT: Who were present at the time?

MR. DAVIS: Q. Who was present at the time you had this conversation with Mr. Clark?

A. Immediately present were Mr. Clark and Mr. Heslet and Mr. Enders and myself. There were others with us, but they weren't around us,—they were looking at the property.

Q. What was your occasion for being in Soda Springs at that time?

A. Mr. Clark wired me to meet him at Soda Springs, to go over the company's property and look it over and see what condition it was in.

Q. To go over what company's property?

A. The Natural Mineral Waters.

Q. Do you recall where you were when you had this conversation about the Enders matter?

A. Not clearly. It was either by Mr. Clark's car at Soda Springs, or it was near what they call the Hooper spring; I am not certain though.

Q. Well, it was at those springs about that time?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

MR. SHELTON: Objected to as incompetent, irrelevant, and immaterial, if the Court please.

THE COURT: Was this conversation between Mr. Enders and Mr. Clark?

A. Directly I think it was, but we all entered into the conversation, both Mr. Heslet and—

THE COURT: Very well. The objection is overruled.

MR. DAVIS: Go ahead, Mr. Shearman.

A. Mr. Enders took up the matter of the sale of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr. Clark that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him, and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

Q. Now, was there any other conversation with reference to the terms,—did Mr. Clark say anything with reference to the terms that the deed should be left there on?

MR. SHELTON: I object to this, if the Court please, upon the same grounds.

THE COURT: Overruled.

A. At that particular time, I think not, in my presence.

MR. DAVIS: Q. Well, when after that in your presence did he?

A. Mr. Clark told me—

THE COURT: No.

MR. DAVIS: No. When after that—

A. During that same day, but I don't know just where. We went all over the property, and occasionally he would drop back and have a chat with me and say something, and I can't tell you just where it occurred.

Q. But it was at Soda Springs?

A. Yes, sir.

Q. Now what was that conversation?

THE COURT: Who were present when that conversation took place?

A. I think it was just Mr. Clark and myself. I don't remember anybody—Mr. Heslet may have been present, but I am not certain.

THE COURT: I can't see how it would be material what Mr. Clark may have said to this gentleman. This gentleman wasn't representing Mr. Enders.

MR. DAVIS: I thought if this gentleman communicated it to Mr. Enders and it was on behalf of Mr. Clark, as an agent of the company—

THE COURT: Well, if you promise to do that. Do you promise to do that?

MR. DAVIS: I will ask the witness first. It is my understanding that he will. This conversation

that you had with Mr. Clark later now, did you subsequently communicate that to Mr. Enders?

A. No, not that particular conversation that I have in mind, I did not.

Q. You didn't communicate that to Mr. Enders?

A. No.

Q. You say the particular one you have in mind. Did you communicate any conversation to Mr. Enders that you had with Clark at that time with reference to this—

A. I don't think I told Mr. Enders anything that he didn't hear himself in talking to Mr. Clark, is my best recollection.

Q. You don't think Mr. Enders was there when you had this last conversation I am asking you about?

A. I think not.

Q. Was there any other conversation in the presence of Mr. Enders there, other than you have related?

A. I think there was considerable talk between Mr. Enders and Mr. Clark.

Q. Well, if you know, I want to know what the rest of that conversation was.

A. I don't clearly remember what it was. I think it was concerning the paying for the property. Mr. Enders was talking to Mr. Clark, the president of the company, and I don't remember clearly what was said. I remember plainly about his saying he wanted the deed left in Soda Springs.

Q. You don't recall the exact terms of the language, of the conversation with reference to that matter between them?

A. No, I do not.

Q. Do you know, Mr. Shearman, whether or not Mr. Enders has paid the taxes on this property?

MR. SHELTON: I object to that as immaterial, of course.

THE COURT: I think I will let him answer. You may answer, if you know.

A. I know the Natural Mineral Water Company has not—

THE COURT: No. Do you know whether or not Mr. Enders has paid the taxes? If you don't know, so state, and get on.

A. He told me he had, but that is all.

THE COURT: That may be stricken out.

MR. DAVIS: Q. Has the Natural Mineral Water Company paid any taxes on it since—

THE COURT: Gentlemen, if Mr. Enders has paid the taxes and the matter is material, you ought to have the receipts and show conclusively, without taking up the time of the Court here by getting at it in this indirect way.

MR. DAVIS: Q. Well, do you know whether Mr. Enders has paid interest on the amount of the purchase price?

A. Yes, he has paid interest.

Q. And to whom did he pay that?

A. He sent it in to the office of the Fred J. Kie-

sel Company, or the Fred J. Kiesel estate, and it was credited to the Natural Mineral Water Company upon the books.

MR. DAVIS: That is all with this witness at this time.

CROSS EXAMINATION.

By MR. SHELTON:

Q. You know nothing, Mr. Shearman, in regard to the actual payment of any interest, except upon the indebtedness which was due to the Kiesel estate, do you? There was some indebtedness due to the Kiesel estate?

A. The only interest I know that has been paid is the interest on the \$4,000 owing to the Natural Mineral Water Company, for the property.

Q. But the Kiesel estate had some claim against Enders, did it not, in addition?

MR. DAVIS: I object to that, if the Court please, as being incompetent and immaterial.

THE COURT: Overruled.

MR. SHELTON: Q. Wasn't there some indebtedness due from Enders to the Kiesel estate?

A. In addition to this?

Q. In addition to this that you speak of?

A. Not that I know of, no.

MR. SHELTON: That is all.

THE COURT: How much interest did he pay, Enders?

A. Six per cent per annum on the \$4,000 .

Q. (By the Court). From what time?

A. I think it was from some time in April, 1918, but I am not positive about that. It was when he assumed, took over the property.

MR. SHELTON: What date, did you say?

A. I am not certain. I think it was in the early spring of 1918, if my recollection serves me.

Q. The spring of 1918?

A. I think that is when Mr. Enders took the property, yes, sir, or maybe the first of the year. I—

Q. That was before any negotiations at all that you have spoken of?

A. Oh, no. Negotiations began in 1917.

Q. How do you know that?

A. By correspondence and files.

Q. Nothing except from what you have seen in the correspondence?

A. No, sir. Well, except that Mr. Kiesel had told me.

Q. What Mr. Kiesel has told you is hearsay.

A. Yes; he told me he had sold the property.

Q. And this interest that you speak of was from 1918, you say,—in the nature of rent of the property, or what was it?

A. Interest on the \$4,000 at six per cent.

Q. What \$4,000?

A. \$4,000 of the purchase money.

Q. Why do you speak of it as the purchase money?

A. The property was sold to Mr. Enders for \$4,000.

Q. How do you know that?

A. I know from the correspondence. I know because Mr. Kiesel told me he had sold it.

Q. You know nothing of your own personal knowledge, do you?

A. No, except what he told me and what the correspondence showed.

Q. That is all?

A. That is all, yes, sir.

Q. Simply what Mr. Kiesel told you?

A. That's all, yes, sir.

Q. Then your knowledge of that is entirely hearsay, isn't it?

THE COURT: Well, that is argument.

MR. SHELTON: Yes, Your Honor. If the Court please, I move to strike it out upon the ground that his testimony is based upon hearsay evidence and not upon knowledge of his own.

THE COURT: Well, he seems to know about the payment of this interest; he seems to have knowledge of that personally.

MR. SHELTON: He knows a certain amount was paid, but he don't know what it was for except from hearsay.

MR. JONES: I take it that he received this interest from Enders himself and credited it on the books.

THE COURT: I think I shall deny the motion. It has come out on cross-examination, that is, some of the matter has come out on cross-examination. How does the money come to you,—by mail or personally? How was it paid, since you have had anything to do with it?

A. By check.

THE COURT: And how long have you been receiving it,—from 1918?

A. No, sir; not personally. I didn't take charge of Mr. Kiesel's estate entirely until November 15, 1919. I did, however, run the office from the time of his death. I was in the bank, but I also had to go up and run the affairs of the office.

THE COURT: How long has it been since payments have come from Mr. Enders on some account to you?

A. To me personally?

THE COURT: Well, to you in any capacity, just so they come to you.

A. I don't think I have received any personally.

THE COURT: Well, did you receive any officially?

A. Well, it went into the office, Your Honor, as near as I can remember, by mail.

THE COURT: I am trying to find out, Mr. Shearman—we have difficulty in understanding each other. How do you know that any money came in there at all from Mr. Enders?

A. I have seen the check, and I have been in charge of Mr. Kiesel's office—

THE COURT: When did you begin seeing the checks there?

A. In 1918-1919.

THE COURT: That was after Mr. Kiesel died, or before?

A. I can't remember.

THE COURT: What opportunity did you have to see them before Mr. Kiesel died?

A. I was in the office.

THE COURT: Whose office?

A. More or less. Kiesel's office.

THE COURT: Well, did you have any duty there?

A. Yes, sir.

THE COURT: What was your duty there?

A. My duty was to become acquainted with Mr. Kiesel's affairs.

THE COURT: And that was before he died?

A. Yes, sir.

THE COURT: How did you happen to have that duty?

A. I was in Salt Lake City. I was City Commissioner. And Mr. Kiesel came to me and told me that he was getting to be an old man, that his own son was in Sacramento and couldn't possibly leave—

THE COURT: I don't care about that. Did he employ you?

A. Yes, sir.

THE COURT: That is what I am trying to get at. Now when did you first enter into Mr. Kiesel's employ?

A. About March, the last of March or the first of April, 1917, part of my time I devoted to Mr. Kiesel's affairs and the balance to the Security State Bank.

THE COURT: Was Mr. Kiesel interested in the Security State Bank?

A. Yes, sir. He was president.

THE COURT: And all of your time was given to those two interests then?

A. Absolutely.

MR. DAVIS: Q. Are you any relation to Mr. Kiesel?

A. Son-in-law.

MR. DAVIS: I would ask to have this marked. A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 9.

RE-DIRECT EXAMINATION.

By MR. DAVIS:

Q. Mr. Shearman, calling your attention to Plaintiff's Exhibit No. 9, I will ask you if you are familiar with that?

A. It is a letter that came into the office with a remittance from Mr. Enders.

Q. Are you familiar with the incidents of the remittance and its being credited?

A. Well, I must have been, but I don't remember.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 9.

MR. SHELTON: Was this letter received by you?

A. Into the office of the Fred J. Kiesel Company.

MR. SHELTON: And is it from your files?

A. Yes, sir.

MR. SHELTON: And this is the check that you refer to?

A. That is one; yes, sir.

MR. DAVIS: That is the check he refers to, a check.

MR. SHELTON: Or one of the checks. Is this the particular check that you refer to?

A. I didn't understand that I was asked about any particular check.

MR. SHELTON: A check for interest?

A. That is a check; yes, sir.

MR. SHELTON: I object to it, if the Court please, upon the ground that it shows that no contract had been entered into at that time, and doesn't purport to be any contract with the Natural Mineral Water Company.

THE COURT: Overruled.

MR. DAVIS: Q. Was this check referred to in the letter credited to the account of the Natural Mineral Water Company?

A. Yes, sir.

MR. DAVIS: That is all.

MR. SHELTON: That is all.

MR. DAVIS: Recall Mr. Enders.

THEODORE ENDERS, heretofore duly sworn in behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Mr. Enders, I hand you Plaintiff's Exhibit No. 5, and ask you if you remember receiving that letter?

A. Yes, sir.

Q. After you received that letter when was the next time that you saw Senator Clark, W. A. Clark?

A. About July the 20th.

Q. Where was that?

A. In Soda Springs.

Q. And what year?

A. Eighteen and twenty.

Q. Eighteen-twenty?

A. Nineteen and twenty.

Q. Who else was with Mr. Clark at Soda Springs at that time?

A. Why, Mr. Shearman and me and Heslet.

Q. Heslet. Was that the man who wrote the letter to you here, Exhibit 5?

A. Yes.

Q. At that time did you have any conversation with Mr. Clark in Soda Springs with reference to the purchase of the Idanha Hotel?

MR. SHELTON: Objected to as incompetent and immaterial.

THE COURT: Overruled.

MR. DAVIS: Q. Did you, Mr. Enders?

A. Yes.

Q. Will you tell what that was?

A. I suggested to Mr. Clark that the deed be left in Soda Springs, as it would be more convenient for me, and he said—

THE COURT: A little louder.

A. I suggested to Mr. Clark that I wished him to leave the deed in the Soda Springs Bank, as it would be more convenient for me, and he told me that that would be all right, and he said, "Now, Mr. Enders," he said, "I want you to understand everything you done with Mr. Kiesel I am going to back up."

Q. You said something about—

A. He means to say that Mr. Kiesel, what I talk with him, and bought the Mineral Water Company property, after he died he take his place, and it would be just the same with him as it was with Mr. Kiesel, that he back Mr. Kiesel up, and the deed shall be left there in the Soda Springs Bank, and on me paying the \$4,000 then I shall receive the deed.

MR. SHELTON: Then you what?

A. I shall receive the deed.

MR. SHELTON: When you paid the \$4,000 you were to receive the deed?

A. Yes.

MR. DAVIS: Q. Did Mr. Clark give you any instructions further with reference to the deed? Did Mr. Clerk instruct you to communicate your talk to the bank at Soda Springs?

A. Yes. He was standing right where the railroad track is.

MR. SHELTON: I want to object.

THE COURT: Read the question.

(Question read.)

A. Yes, sir.

MR. DAVIS: Q. Did you report that?

A. Yes, sir.

Q. Who did you talk to?

A. Torgesen.

Q. That was the gentleman that was on the stand this morning?

A. Yes, sir.

Q. Mr. Enders, did you ever go to the bank to examine the deed?

A. I looked at the deed, yes.

Q. Calling your attention to Plaintiff's Exhibit No. 4, is that the deed that you looked at at the bank, do you know?

A. Yes, this is the deed.

Q. Now, Mr. Enders, tell us what your agreement was with Mr. Clark there as to when, as to the terms of the purchase, when you should have the deed.

MR. SHELTON: If the Court please, the witness has testified that he had this conversation with Senator Clark, and that was all there was to it. Now—

THE COURT: Did you have any other conversation with Mr. Clark?

A. Yes, sir.

THE COURT: Go on and tell us.

MR. DAVIS: Go ahead. It is hard for this witness to bring that out clearly, some way. Go ahead and tell us what that was.

A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years' time to pay it in," and he said, "That will be all right Mr. Enders."

MR. SHELTON: Mr. Kiesel gave you what?

A. Six years' time to pay it in, at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us for the last twelve years, and we have tried to show you that we are your friend, we try to do something for you."

MR. SHELTON: I move to strike that out as incompetent.

THE COURT: Overruled.

MR. DAVIS: Q. Now, Mr. Enders, I don't think I asked you this morning. You were to have six years from when to pay for the property?

A. From the time I took it over.

Q. And when did you take it over?

A. The first of February.

Q. What year?

A. 1918.

Q. Who occupied it from the first of February, 1918, until the time it burned, or until the present time?

A. I did.

Q. And I believe you stated this morning you paid the taxes on it?

A. Yes, sir.

Q. Who occupied it before you went in?

MR. SHELTON: If the Court please, in regard to his paying the taxes, the only evidence that is available of that is the receipts which he has received, and I move to strike out the testimony with regard to the payment of taxes. Your Honor has already sustained that objection.

THE COURT: It hasn't been shown that there were any taxes levied upon it.

MR. SHELTON: The taxes were levied in the name, as I understand, of the Mineral Water Company.

THE COURT: A. There is no showing that the taxes were levied. The ordinary way of showing the payment of taxes is to show the receipts.

MR. DAVIS: Unfortunately Mr. Enders usually loses his receipts of all kinds. He has one or two.

Q. Do you know, Mr. Enders, why it was that a deed wasn't placed in the bank—

THE COURT: I will sustain the motion about the taxes then. I thought you were going to have him produce the receipts, or something.

MR. DAVIS: I don't think he has any.

THE COURT: Or at least state what taxes were paid.

MR. DAVIS: Q. Did you receive tax notices and were taxes levied upon the Idanha Hotel property that you bought?

A. Yes, sir.

Q. Were they addressed to you?

A. Yes, sir.

Q. The notices?

A. Yes, sir.

Q. And did you pay them?

A. Yes, sir. I didn't pay them one payment and they got delinquent on me last year, but I took them up and paid them again.

Q. You have taken them up since?

A. Yes.

Q. Who was in possession of the premises before you took possession in 1918, in February?

A. Why, in 1917 Mr. C. T. Woodall was in possession.

Q. And do you know the occasion of Mr. Woodall leaving possession? Who did he give possession to?

A. To me.

Q. Do you know at whose request?

A. At Mr. Kiesel's. He sent me a letter on Mr. Woodall, and the letter says, "Mr. Woodall, you will please vacate Idanha Hotel. I have sold it to Mr. Enders."

Q. Now, Mr. Enders, your name is Theodore?

A. Yes, sir.

Q. You are sometimes known as "Theo"?

A. Yes, sir.

MR. DAVIS: Will you mark these?

Certain papers were marked as

PLAINTIFF'S EXHIBIT NOS. 10, 11, 12
and 13.

MR. DAVIS: We offer in evidence Plaintiff's Exhibits Nos. 10, 11, 12 and 13, being the original policies which are set up in the complaint and admitted by the answer.

MR. SHELTON: No objection.

MR. DAVIS: Q. Did you make any written application for these policies, for the issuing of these insurance policies?

A. No, sir.

Q. Who did you go to with reference to the procuring of this insurance?

A. To Mr. Jackson.

Q. What Mr. Jackson is that,—William H. Jackson, Jr.?

A. Yes, William H.

Q. And where was it you went to Mr. Jackson?

A. He had his office down here in Pocatello, in the building—Standrod's hotel, on the corner where the Stockgrowers' Bank used to be.

Q. That was on the 27th day of April, 1921?

A. What day?

Q. That was on or about the 27th day of April, 1921, when the policies were issued?

A. Yes, something like that.

Q. Just relate your conversation with Mr. Jackson with reference to the—pardon me—I believe I stated—no, it was April—

A. I think it was April 21st.

Q. Yes, that was it.

A. Not the 27th.

Q. No, the 21st.

A. Yes.

Q. It was April 27th the policies were issued, Mr. Enders, but that is admitted in the pleadings.

A. When I had the talk with him.

Q. There is no question about it. What was your conversation with Mr. Jackson at the time you applied for this insurance?

MR. SHELTON: Objected to as incompetent, irrelevant and immaterial, if the Court please, upon the ground that no oral testimony of any conversa-

tion leading up to the policies is admissable in this Court.

MR. JONES: If the Court please, there was no written application. It was purely verbal.

THE COURT: Well, suppose there isn't any written application, the policy constitutes the contract, doesn't it?

MR. DAVIS: The point isn't to vary the terms of the contract by parol, but is merely to show that the Kiesel estate had no interest in it, that he didn't instruct him to put anything in there about the Kiesel estate. We are not trying to vary the terms of the policy. It is just upon the theory that they insured somebody that had no interest.

THE COURT: Well, you can show now that the Kiesel estate had no interest, if you desire, show that as a matter of fact, if it is material, if that provision in the policy is material we will have to reform the policy, and my impression is that it is wholly immaterial if as a matter of fact the Kiesel estate have no interest in it.

MR. DAVIS: That is a fact. They have no interest. But they have put in issue this allegation of the complaint, denying that they had such conversation. They did not move to strike it out because it is immaterial or anything of that kind.

MR. SHELTON: That is immaterial, if the Court please. The issue is joined upon that proposition, but the allegation that there was a certain conversation had with the agent is immaterial and

incompetent, for the reason that the terms of the policy itself—

THE COURT: Objection sustained.

MR. DAVIS: Q. Mr. Enders, at the time the policies were issued did the Kiesel estate have a mortgage upon this property, upon the Idanha property?

A. No, sir.

Q. Did the Kiesel estate have any interest in the Idanha property?

A. No, sir.

Q. Did you advise or request that a mortgagee clause be put in your policy, making it payable to the Kiesel estate?

A. No, sir.

MR. SHELTON: Objected to, if the Court please, as incompetent and immaterial.

THE COURT: I shall sustain the objection. I may permit you to go into this in rebuttal, if there is any contention on their part—

MR. DAVIS: Yes.

Q. Has the Kiesel estate at any time since that time had any interest in this property, as the Kiesel estate?

A. No, sir.

Q. When did this hotel building burn, Mr. Enders?

A. As near as I recollect, it was the 7th of June.

Q. What year?

A. 1921.

Q. Yes. After the fire what did you do, Mr. Enders?

A. I notified Jackson, the man what made out the insurance, that the building burned down.

Q. Did you notify him the same day?

A. Why, I think—yes, in the afternoon.

Q. Yes.

A. Yes.

Q. Do you know what caused that loss, or what was the origin of the fire?

A. I do not.

Q. Has the defendant ever paid you for the loss, the insurance?

A. No, sir, I haven't seen anybody—

Q. What did you tell Mr. Jackson when you advised him of the loss?

MR. SHELTON: Objected to, if the Court please.

A. I told him that the building burned.

THE COURT: You telephoned, did you?

A. Yes, I telephoned.

THE COURT: You may answer.

A. I told him that the Idanha burned down.

MR. DAVIS: -Q. What did he say, if anything?

A. He says it was too bad.

Q. What else did he say?

A. He said, "I will notify my company at once."

Q. Did you see Mr. Jackson again—how long after that before you saw Mr. Jackson again?

A. About a week or so.

Q. Did you have any conversation with him then about the matter?

A. Well, he told me that he got word from the company, that the adjuster would be up there and adjust the matter in a very short time. He didn't know exactly the date at that time, but a little bit later on he told me the date.

Q. A little later he told you what?

A. He told me the date when they was coming up there.

Q. Did you see the adjusters when they were in Soda Springs?

A. No, sir, I did not.

Q. Were you in town?

A. I don't know. I don't know when they come.

Q. How long after the fire before you went to Ogedn?

A. On the 12th of June I went down to Ogden.

Q. And who did you go to see there?

A. Mr. Shearman.

Q. Did you go to see the adjusters at that time?

A. No, sir.

Q. Did you delegate anyone to act for you in this matter with reference to seeing the adjusters and adjusting your loss?

A. Yes, I told Mr. Shearman that I didn't know anything about insurance companies, that he had better take this up for me, in my behalf, and attend to it.

Q. He did so, you say?

A. I told him to do this for me.

Q. Well, did he do that?

A. Yes. He corresponded with me off and on, and told me what they said and so on.

Q. And did he report to you orally also from time to time as to the negotiations?

A. Yes, sir.

Q. Was any request ever made upon you directly by the defendants or their adjusters for any proof in reference to this matter?

MR. SHELTON: What was that question?

MR. DAVIS: I asked him if any request was made upon him directly. These are the requests you set up in your answer. Was any request made upon you directly?

A. I really don't understand that.

MR. DAVIS: Mr. Shelton, I presume, without going into that with him, you plead these—you are willing to have one of them as a sample of all admitted, as the notice that Croxford & Young sent, and the four of them are identical.

MR. SHELTON: They are all identical, as I understand.

MR. DAVIS: Will you mark that?

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 14.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 14, being a demand or request on a letter sent to Mr. Enders by Croxford & Young, as ad-

justers for the British and Federal Fire Underwriters, on August 19, 1921. And, as I understand it, it is agreed between counsel that a similar letter was sent by registered mail upon the same day to the same party for each of the other insurance companies.

Q. Now, Mr. Enders, handing you Plaintiff's Exhibit No. 14, do you remember of receiving that?

A. Yes.

Q. Do you remember receiving it?

A. Yes.

MR. DAVIS: Now I ask counsel for the defendant if you have in your possession the original letter written by Mr. Enders to Croxford & Young on August 21st, for which we have served written notice?

MR. SHELTON: Yes, I think we have.

MR. DAVIS: Here is the copy. That may help you to locate it.

THE COURT: Perhaps there is no objection to using the copy. Is there any objection to using the copy?

MR. SHELTON: No, Your Honor. I have the original, I am sure.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO 15.

MR. DAVIS: Q. Did you make any reply by letter to the demand made on you under Plaintiff's Exhibit 14?

A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 15, is that the—

MR. SHELTON: That is the original of that letter.

MR. DAVIS: We had better perhaps mark the original, and I will just keep this and have the original go in.

Said original letter was marked

PLAINTIFF'S EXHIBIT NO. 15.

Q. Is that the letter that you sent them in reply to that?

A. Yes, sir.

MR. DAVIS: We now offer in evidence Plaintiff's Exhibit 15. And now, Mr. Shelton, if you will give us those original affidavits, the statements—

THE COURT: Gentlemen, upon this issue now you would better read these to the jury as you go along, so that they will be advised.

MR. DAVIS: It would probably not be well for me to read the other exhibit nine with reference to the interest?

THE COURT: I think you would better read on this subject and read the others later.

MR. DAVIS: Yes, Your Honor.

(Reading) "PLAINTIFF'S EXHIBIT NO. 14

CROXFORD & YOUNG

Adjusters of Fire Losses

302-3 Ness Building.

Salt Lake City, Utah, August 19th, 1921.

Mr. Theo. Enders,
Soda Springs, Idaho.

Dear Sir:

In the event you make claim under Policy No. 54277 of the British & Federal Fire Underwriters of Norwich, England, for loss to the property insured under said policy, alleged to have been caused by fire of June 7th, 1921, you are hereby respectfully requested to comply with all the terms and conditions of said policy contract, and your especial attention is called to that portion of same recited in lines 70 to 76 inclusive, reading as follows, to-wit:

“Within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building

herein described and the several parts thereof were occupied at the time of the fire."

Yours truly,

BRITISH & FEDERAL FIRE UNDERWRITERS.

By CROXFORD & YOUNG,

Y/JHB

Adjusters."

"Registered"

PLAINTIFF'S EXHIBIT NO. 15.

"HOTEL ENDERS. EUROPEAN PLAN.
MODERN

Soda Springs, Idaho, August 21, 1921.

Messrs. Croxford & Young,
302-3 Ness Building,
Salt Lake City, Utah.

Gentlemen:

Your letters under date of August 19th, written by yourselves as adjusters for the companies interested in the fire which destroyed the Idanha Hotel and contents, have been received. In reply thereto, please be advised that I am preparing schedules showing the list of properties damaged and these will be sent you as soon as they are completed.

With regard to that part of the insurance contract permitting sixty days in which for the insured to make proper claim, may I state that I advised agent Jackson at Pocatello, Idaho, of the fire imme-

diately thereafter and had supposed that he was handling the matter for my interests.

Very truly yours,

THEO. ENDERS."

MR. DAVIS: Q. Mr. Enders, did you later, after writing Exhibit 15, furnish the defendants with a sworn statement?

A. Yes, sir.

Q. Who prepared it for you?

A. Melvin.

Q. Who is Melvin?

A. A Lawyer at Soda Springs.

Q. You employed him to prepare the statements for you?

A. Yes, sir.

MR. DAVIS: I will have this marked Plaintiff's Exhibit 16.

A certain paper was marked
PLAINTIFF'S EXHIBIT NO. 16.

Q. Mr. Enders, calling your attention to Plaintiff's Exhibit No. 16, were these additional clauses and forms attached to that when you returned it?

A. This here?

Q. Yes, this. Where did you get those? Who furnished those to you?

A. I don't know where we got them. I don't know—I think he took a copy from the policy.

Q. You don't know, Mr. Enders, where you got these. Are you positive that these different form

clauses here were attached to your sworn statement when you sent it in, or do you remember?

A. No, I don't think that was attached to it.

Q. Well, do you know, do you remember or not?

A. This is the—

Q. I am asking you if you remember that these were fastened on there or not.

A. I don't remember.

Q. You don't remember?

A. No.

Q. This is your signature here?

A. Yes.

Q. And that is the sworn statement that you made and sent in?

A. Yes.

Q. At the time you signed it, Mr. Enders, do you remember whether these were tacked on here, these extra clauses and conditions, or not? Were they fastened here when you signed it?

A. I don't remember.

Q. You don't know?

A. I don't remember.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit No. 16, being sworn statement made by the assured. We offer in evidence Plaintiff's Exhibit 16, consisting of two pages, being a statement made by the assured at Soda Springs, Idaho, on September 20, 1921, and we offer it without the clauses that are annexed to it either, for the reason that the assured has been unable to identify those as having

been attached to it, and offer it for the purpose of offering his sworn statement in response to the request of the adjusters for additional information.

MR. SHELTON: I don't understand the offer if the Court please. The offer is called a proof of loss or affidavit. It is just as we received it here. They called upon us to produce the original, and we have produced the original, and of course it should be offered in evidence as it stands, if it is offered in evidence. I don't know whether it is correct or not so far as the plaintiff is concerned, but I know it is the proof of loss that was presented to us.

THE COURT: I think it will all have to go in, unless you show that it was not in that condition when it was sent.

MR. DAVIS: Well, he doesn't remember. I don't know how we could show it any further. We will offer it then.

THE COURT: It may go in.

MR. DAVIS: And it is agreed between counsel that a similar sworn statement was made by the assured to each of the other companies.

MR. SHELTON: The same thing.

MR. DAVIS: Now have you the letters we asked for, the original of this letter mailed to the different companies on October 24th, asking for some information?

Gentlemen, I will read you Plaintiff's Exhibit No. 16. (Reading)

PLAINTIFF'S EXHIBIT NO. 16.

"Soda Springs, Idaho, Sept. 20, 1921.

In the Matter of the Loss by Fire)
in the Destruction of the Idanha)
Hotel Building, at Soda Springs,) STATEMENT.
Idaho, on June 7th, 1921.)

State of Idaho,)
) ss.

County of Caribou.)

Theodore Enders, being duly sworn, deposes and says as follows, to-wit:

That he is the assured named in Policy No. 8021950, of the Commercial Union Assurance Company, Limited, of London, England, covering the Idanha Hotel building at Soda Springs, Idaho, and the furniture and contents thereof; that said building and its contents, except as hereinafter set out, was completely consumed and destroyed by fire on the 7th day of June, 1921; that affiant has no knowledge or belief as to the actual origin of the fire; that the interest affiant had in said property, is, he was the owner of said building and the land on which the same stood by purchase thereof under contract and escrow agreement from the Kiesel Estate and Ex Senator Clark, and was the sole and absolute owner of the furniture and property contained therein; that the Kiesel Estate has and holds an interest in said property as security in the sum of about \$5400.00; that there were and are no other encumbrances thereon; that since said insurance

was effected, there has been no change, in title, use, occupation, location, possession, or exposure of said property; that said building was used and occupied by various persons for living and rooming purposes, and the kitchen thereof was used and occupied by Mrs. Hart as a laundry.)

That the cash value of each item and the loss thereon, is as follows, to-wit:

The entire hotel building \$25,000.00, top hall carpet \$50.00, linoleum on lower hall, \$100.00, linoleum on dining room floor, \$200.00, galvanized water tank, \$100.00, double range stove, \$200.00, meat broiler, \$75.00, 25 sets bed springs at \$20.00 per set, \$500.00, 25 bedsteads at \$18.00 each, \$450.00, 25 mattresses at \$25.00 each \$625.00, 25 oak chairs at \$4.50 each \$225.00, 25 carpets at \$25.00 each, \$625.00, 7 cook stoves at \$25.00 each, \$175.00, 2 cook stoves at \$70.00 each, \$140.00, 25 dressers at \$25.00 each, \$625.00, 15 small tables at \$4.00 each, \$60.00, 10 large tables at \$10.00 each, \$100.00, 5 heating stoves at \$25.00 each, \$125.00, 1 large parlor carpet, \$200.00, 1 large office desk, \$75.00, 1 parlor lounge \$20.00, 1 large center and writing table, \$75.00, 6 upholstered chairs at \$6.00 each \$36.00, 50 pillows at \$2.50 each \$125.00, and bedding and linen for 25 rooms at \$16.00 per room \$400.00.

That the cash value of each item saved from said fire is as follows, to-wit:

1 mattress, \$25.00, 1 bed stead \$18.00, 1 set bed springs \$20.00, 1 dresser \$25.00, 2 pillows at \$2.50 each \$5.00, bedding and linen for one room \$16.00, 1 medium table \$10.00.

That the other insurance covering said property, with a copy of all descriptions and schedules in policies, is as follows, to-wit:

The Alliance Insurance Company of Philadelphia.

The Commercial Union Assurance Company, Limited, of London.

The Star Insurance Company of America.

THEODORE ENDERS,

Assured.

Subscribed in my presence and sworn to before me this 21 day of September, A. D. 1921.

D. K. McLEAN,

Notary Public for Idaho, residing at
(Seal) Soda Springs, Idaho.

My commission expires September 1923."

MR. DAVIS: I haven't read you the other clauses in the policy, and it is stipulated by counsel that one of those statements was sent to each of the companies.

This may be marked Plaintiff's Exhibit No. 17.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 17.

MR. DAVIS: Q. After making the sworn statement, Exhibit 16, was any objection made to the

same or to the form of the same by the defendant to you?

A. I don't quite understand it.

Q. After you made this and mailed it in, was any objection made to you as to the manner in which it had been made or as to the manner in which you had set out the items—

A. Well, I objected—

Q. I mean did the company object?

A. No, the company never said anything.

Q. Did you write to the different companies after that with reference to it?

A. Yes, I wrote to them.

Q. Handing you Plaintiff's Exhibit No. 17, I will ask you if that is one of the letters you wrote to them?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 17, being the original letter sent by registered mail from Theodore Enders to the Star Insurance Company, San Francisco, California. And it is agreed that a similar letter on the same date was sent to each of the other companies involved herein. Is that agreed, Mr. Shelton?

MR. SHELTON: Yes, I think so.

MR. DAVIS: Reading you Plaintiff's Exhibit 17, showing the envelope and letter to J. B. Cremer, Secretary of the Star Insurance Company, San Francisco, bearing date Soda Springs, Idaho, October 24th, 1921.

PLAINTIFF'S EXHIBIT NO. 17

"Soda Springs, Idaho, October 24, 1921.

Mr. J. B. Cremer, Sec'y.

Star Insurance Company,
San Francisco, California.

Dear Sir:

In re destruction of Idanha Hotel Building and contents by fire, at Soda Springs, Idaho, will say, that on September 20th, 1921, I forwarded to Croxford & Young, adjusters, an inventory and appraisal of loss, but as yet have not heard regarding same. Awaiting your reply, I am,

Very respectfully,
THEODORE ENDERS."

MR. DAVIS: Did you receive any replies from the companies, to that letter?

A I received a reply from one or two companies, but not from all of them.

MR. DAVIS: I will ask that this be marked Plaintiff's Exhibit No. 18.

A certain paper was marked
PLAINTIFF'S EXHIBIT NO. 18.

Q. I hand you Plaintiff's Exhibit No. 18, and ask you if that is one of the letters you received in reply to the letter just read?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 18.

MR. SHELTON: No objection.

MR. DAVIS: Mark this one 19.

A certain paper was marked
PLAINTIFF'S EXHIBIT NO. 19.

Q. Handing you Plaintiff's Exhibit No. 19, is that one of the letters you received in reply to the letter you wrote the company?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 19. That is practically the same letter as the other one—not quite.

I will read you Plaintiff's Exhibit 18 while counsel is examining that: (Reading)

PLAINTIFF'S EXHIBIT NO. 18.

“STAR INSURANCE COMPANY OF AMERICA.
PACIFIC DEPARTMENT.

Thos. H. Anderson, Manager.

San Francisco, October 28, 1921.

Mr. Theodore Enders,
C/O Mr. C. E. Melvin,
Soda Springs, Idaho.

Dear Sir: Re: Policy No. 28857—Enders.

We beg to acknowledge receipt of your letter of October 24th, in connection with loss to the property insured under the above policy.

We have referred this matter to Adjusters Crox-

ford & Young, who will, no doubt, give the same immediate attention.

Yours very truly,

THOS. H. ANDERSON,

CJD:MB.

Manager."

MR. DAVIS: Any objections to 19?

MR. SHELTON: No.

MR. DAVIS: Plaintiff's Exhibit 19 is as follows:

(Reading) PLAINTIFF'S EXHIBIT NO. 19.

"COMMERCIAL UNION ASSURANCE

COMPANY LIMITED OF LONDON.

San Francisco, Nov. 1st, 1921.

Mr. Theodore Enders,

C/O C. E. Melvin,

Soda Springs, Idaho.

Dear Sir:

We have for acknowledgment your favor of October 24th in regards to destruction of Idanha Hotel Building. In response wish to say that we have referred your letter to Croxford & Young of Salt Lake City for answer as they have this matter in charge.

Yours very truly,

McG:ALD.

C. J. HOLMAN, Manager."

MR. DAVIS: Q. Did you receive letters from the other two companies in reply to that?

A. No, sir.

Q. Did the companies ever write you any further than these letters?

A. That's all.

Q. You just received the statement No. — the letter, Plaintiff's Exhibit 14, from Croxford & Young, and these letters from the companies?

A. Yes, and these two.

Q. Mr. Enders, from whom did you buy or purchase the furniture and fixtures,—I guess—furnishings and furniture of the Idanha Hotel?

A. From different parties.

Q. Did those furnishings and furniture belong to you?

A. Yes, sir.

Q. You were familiar, of course, with them, and bought them?

A. Yes, sir.

Q. Do you know what the values of the same were at the time of the fire?

A. Yes, sir.

Q. What was that?

A. About five thousand and some dollars.

Q. Five thousand and some dollars?

A. Yes, sir.

Q. I believe you told me that Mr. Shearman did report to you from time to time his negotiations with Croxford & Young?

A. Yes, sir.

Q. Were you ever advised, Mr. Enders, that there was anything required from you in the nature of proof, in the way or manner of furnishing proof other than what you had done?

A. No, sir.

Q. You never were?

A. No, sir.

Q. You paid your premiums for these policies to Mr. Jackson?

A. Yes, sir, I paid them on the 14th day of June.

Q. That was after the fire?

A. Yes, sir, after the fire.

Q. What was the building used for, and how was it occupied, at the time of the fire?

A. There was a laundry in the building, in the kitchen.

Q. Not what was in each room, Mr. Enders—what was it occupied for, what were you using it for?

A. For a “department” and also for people if they wanted a room.

Q. For a hotel?

A. Yes.

Q. Can you describe the building as to size and dimensions?

A. I do know part of it, and I think I give you a letter where I measured it.

Q. Well, can you recall, though, from your memory, without referring to any letter, the measurements of it?

A. Well, it is 99 feet long, and about 60 feet wide, and then the annex is about 60 feet long and about 30 feet wide, I think, or thirty some.

Q. Was it a frame building?

A. Yes.

Q. And how many stories high was it?

A. Three stories.

Q. Was the whole thing, the annex and all, three stories?

A. No; the annex was only two stories.

Q. And the main building, that was sixty something by ninety-nine, and three stories?

A. Yes, sir.

Q. And the other was two stories.

A. Yes, sir.

Q. What was the condition of the building as to repair, with regard to the interior of it?

A. The inside?

Q. Yes.

A. She was in just as good condition as she was when she was put up new, that is, after I fixed it up.

Q. How long before the fire had it been that the interior had been redecorated and kalsomined and painted, etc?

A. The fire was in June—about six months.

Q. And who did that work?

A. Different parties. Mr. Root is one of the parties.

Q. At what expense was that done, Mr. Enders?

MR. SHELTON: Objected to, if the Court please, as immaterial.

THE COURT: Overruled.

MR. DAVIS: Q. At what expense was that done?

A. About \$3000.

Q. Now, \$3,000 to Mr. Root?

A. No. Mr. Root only got about fifteen or sixteen hundred dollars.

Q. And the rest of it—

A. Different parties.

Q. Did you make any alterations in the interior of the building after you took possession of it?

A. Yes, sir.

Q. And what was the expense of that? Did you include that in your \$3,000?

A. Yes, sir.

MR. SHELTON: Objected to, if the Court please, as immaterial.

THE COURT: Overruled.

MR. DAVIS: Would the \$3,000 cover all of the expense that you did in repairing and renovating the buildings, that is, kalsomining it,—I shouldn't have said renovating. Does that cover the whole thing, or were there other expenses, such as shingling?

A. That is all I paid; that covered the whole thing.

Q. That was \$3,000?

A. Yes, sir.

Q. How many rooms were there in the building, Mr. Enders?

A. Did you want to include the dining room, for a room?

Q. Tell me, if you know, how many bed rooms, if you know, first.

A. Well, I had 25 fixed up for bed rooms.

Q. How many rooms were there in the building,—not how many you had fixed up for bed rooms.

A. There was twenty, forty, and then the dining room, dining room, and a storage room,—about 60 altogether.

Q. How was it constructed,—of lath and plaster, the inside?

A. Yes, lath and plaster on the inside.

Q. And what was the height of the ceilings?

A. Fourteen feet.

Q. On each floor?

A. On the lower floor, and 12 feet on the top, on the middle floor.

Q. And what on the top, do you know?

A. About 10 feet.

Q. What was the condition of repair of the building on the outside at that time, Mr. Enders, at the time of the fire?

A. Why, she was in pretty good condition.

Q. She was in pretty good condition?

A. Yes.

Q. Have you had estimates made and have you made investigation to determine the approximate cost of replacing that building at the time it burned?

A. Yes, sir.

MR. SHELTON: Objected to, if the Court please, as not a proper estimate of the value of the building, which is not the loss, but the actual cash market value of the building at the time it was destroyed.

MR. JONES: If the Court please, the actual cash value is the proper measure, but the courts all hold that in determining cash value the cost of reconstructing the building, the difference between a newly constructed building and the building as it was at the time that it burned, would be the way of arriving at the cash value of that building; in other words, by depreciating a new building to the condition it was in at the time it burned.

THE COURT: That would depend upon some other conditions. It would depend upon whether the building was useable, that is, such type of building as was useable. It may be that you would construct a hotel building that was entirely too large for the community and part of it would be worthless, while if you didn't have the building there you wouldn't construct it. Of course, if it was a feasible project, in other words, if it was a going concern, a building that was useable in the community, that would be one way of getting at the value of it, of course, what it would cost to reconstruct or build a new building of the same type, and then depreciate it.

MR. JONES: That is the rule as we understand it. Of course the question as to whether it was useable hasn't been brought out yet, or whether it was being used, but that is the measure, the difference between the value of that building and a new building of the same kind and character.

THE COURT: Well, that is one way of getting at it. Of course that isn't the only method of getting at the value of a building. If it had a market value, if there was a standard of market value in the community, that would be the best way of getting at it, but I don't suppose that can easily be shown.

MR. SHELTON: The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs. That is the language of the policy.

THE COURT: But counsel suggests that one way of getting at the cash value of a building is to find out what it would cost to construct a new building of the same type, and then depreciate it.

MR. SHELTON: Well, the estimate as to what would be the actual cash value of a building must be determined by persons who are acquainted with that property at that particular place and can determine what is the actual cash value of the property itself, the building, constructed we will say early in the territorial days, which has been there for a period of thirty-five or more years, perhaps. Evidently what it would cost to reconstruct that building at this time would not be a proper way of determining the actual cash value of the property at the time of the fire, a wooden building that has been on hand for a great many years, in a community, would not necessarily, couldn't estimate what would

be the actual cash value of it from determining what it would cost at this time.

THE COURT: I think, gentlemen, in view of some circumstances already disclosed, that before I permit you to go into this, you will have to show, make a *prima facie* showing at least, that this is a proper method of getting at the actual cash value of this building.

MR. DAVIS: Perhaps we had better go on, Your Honor. Perhaps this witness isn't the proper witness to show that yet.

THE COURT: It appears now that he was only using part of this building. I think he said he fitted up 25 rooms, and he had about 60.

MR. DAVIS: I think that was for bed rooms. I think he had the rest of it for light housekeeping and apartments, Your Honor.

THE COURT: But I say you will have to go into the circumstances. You have the outstanding fact that the whole property did sell for over \$4000, and not for cash, but under conditions which would make the price more perhaps than what it would bring for cash. We have a *prima facie* case perhaps of its value in the sale price of it. I think you will have to show the circumstances and conditions that would make it practicable or feasible to get at its cash value by taking the course you have suggested.

MR. DAVIS: Q. You state that at the time of

the fire the building was being used for hotel and apartment purposes?

A. Yes, sir.

Q. Were all of the rooms being used?

A. No, sir.

Q. How many of the rooms were vacant?

A. About twenty.

Q. Of the sixty rooms?

A. Yes, sir.

Q. And what were the others being used for?

A. Well, for storage room, and some of them was vacant.

Q. How many rooms did you have let out as apartments at that time, do you remember?

A. Twenty—that is, connected, you mean connected?

Q. As I understood you, you used some for apartments or light housekeeping rooms?

A. Yes, sir.

Q. And the others you used as bedrooms?

A. Yes, sir.

Q. Do you know how many you were using as apartments for light housekeeping?

A. No. I can count those over—twenty was used for light housekeeping?

Q. Yes. And do you recall how many bedrooms you were using?

A. Twenty-five.

Q. And were you using the building all of the time, was it being occupied all the time?

A. Yes, most of the time. Well, we used some more; we used some for laundry and other—the laundry people had some.

Q. How many rooms did they have?

A. They had about four—about five.

Q. But you had some rooms, did you, that there wasn't anything in at all, and weren't being used for anything?

A. Yes, sir.

Q. And you had no furnishings in those?

A. No.

Q. Was the hotel open at all times and being used at all times?

A. Yes, sir.

Q. Someone in charge of it all the time?

A. Yes, sir.

Q. And being used for those purposes?

A. Yes, sir.

Q. Mr. Enders, after you took the building over in 1918, and before Mr. Root did the work that you testified about, that you fixed up the building in 1919, did you have any work done on the building?

A. Yes, sir.

Q. What was that work?

A. I examined the roof and put part of a new roof on it.

Q. At what expense was that done?

A. I didn't make no estimate on that, Mr. Davis.

Q. Well, do you know approximately what it was?

A. Yes.

Q. Well, what was it?

A. About \$300.

Q. That was in addition to the work that you testified a while ago?

A. Yes.

Q. Was the alteration in the inside of the building that you made, the cutting of partitions, etc., was that done, how long after you took it over was that done?

A. That was all done about a year before she burned down.

Q. That would be some time about June, 1920?

A. Yes, during that summer, up till November, was the last work we done.

Q. Did you have a use, as a hotel building, for this building, at all times after you took it over?

A. Yes, sir.

Q. You were using it and taking in customers and doing business there as a hotel all the time?

A. Yes, sir, in connection with the other hotel.

Q. In connection with another hotel that you had there?

A. The Enders' Hotel.

Q. Did you have rooms let for apartment purposes or light housekeeping purposes, all the time?

A. Yes, sir.

Q. Was there someone in there during all the time during this time?

A. Yes, sir.

Q. Did you find a need and a use for this building as a hotel and apartment house during all the time you had it?

A. Yes, sir.

Q. In Soda Springs?

A. Yes, sir. It was the only "department" there was.

MR. DAVIS: I think that is all with this witness, Your Honor. Perhaps when we go into the value we had better take that up in a different way.

THE COURT: I will say to you, gentlemen, that I doubt very much whether I shall permit you to show the value in the manner you have suggested, unless it turns out that there is no other way of getting at it. There are usually other ways that are very much more satisfactory and very much shorter. There ought to be some way of showing the value of this property other than this long round-about way, about which there are so many contingencies and possibilities.

MR. DAVIS: The point with us, Your Honor, is, that the building was there, and of this size, and perhaps a building of that size, there might not be any market for it in Soda Springs, while there was a use for it at its actual value, and we understand the rule to be that if a man had a building constructed, in Pocatello, that cost say thirty or

forty thousand dollars, and the property around it; would depreciate it, still if it cost him that much it would be worth that much, and the mere fact that values in the community, or panics, or anything, had lessened the sale price, wouldn't prevent him from proving and showing the actual value of his property, as long as they carried the insurance.

THE COURT: What do you mean by actual value?

MR. DAVIS: My understanding of the actual value of anything that is destroyed, Your Honor, would be the amount that it would take a man to replace it, less the depreciation, putting it into the actual condition it was at the time. I don't understand that the actual value would always be the market value.

THE COURT: Well, the value of a property of that kind could be reached by showing what it would sell for upon the market, or perhaps what it could be used for, as a feasible investment.

MR. DAVIS: Yes. I think we could show—

THE COURT: Buildings become antiquated. A building might cost fifty thousand dollars, you might have an old hotel building that cost fifty thousand dollars, and it might not be worth five, either upon the market or as a feasible investment.

MR. DAVIS: Yes, I appreciate that, Your Honor.

THE COURT: The difficulty about it is,—Take property of that kind, built many years ago, and in a changing community, property may have been

built for a special purpose, and that purpose may not be feasible.

MR. DAVIS: I think perhaps we can meet Your Honor's suggestion on that by proving the feasibility of it, and proving the income from this property. I think we can do that.

THE COURT: There is no better way, if you can't show the market value, you may show the income value, but you can't do that just for two or three months; you would have to show it over a considerable period of time. But the method you have suggested here is usually the most unsatisfactory method and the most difficult method.

MR. JONES: May I say that this question is discussed fully in the Supreme Court decision, this method that we suggest, and the court in that opinion says that a farmer may have a farm on which he has a house worth \$5,000, and the farm may have no saleable market, so that he couldn't sell the farm which would carry the house probably for two thousand dollars, yet he had insured that house for \$5000, and he would have a right, assuming everything was proper, to show the value of that house, by finding out what it would cost to reconstruct it, and depreciate it. The court goes into a very lengthy dissertation on that very thing. Down there you might be unable to sell this property at all, yet it has a value. He insured that value, up to a certain value. Now to say that it is antiquated, or that the property wasn't readily saleable there, and

use that as a market value, you might not be able to sell it at all.

THE COURT: One may have a luxurious home and get the benefit out of it in that way, and yet not be able to sell it. Nobody else perhaps would want such a luxurious home. But this is a business property; its value is to be referred to one of two standards, either what it would sell for upon the market, or what it could be made to pay as an investment. It can't have any sentimental value. Why should it be insured for more, or why should an insurance company pay more for it than it is worth either upon the market or as an investment? It may be that the building is of such type that no one would think of reconstructing a building of that sort at that particular place. It may have practically no value. We know it is true not infrequently that buildings when they were put up were thought to be of great value, and turned out to be of no value at all, by reason of changing conditions or by reason of bad judgment in putting them up in the first place. That is particularly true of certain types of business property. They become antiquated. No one would think of putting up a business building today of the same type as was put up twenty-five years ago. It is almost impossible to get at the depreciation in that way. It is antiquation rather than depreciation.

MR. JONES: It is only a question of the method of proving, of course.

THE COURT: If you can't show me, gentlemen, that this would be a fair way of getting at this particular building, show that the circumstances are such that it would be a fairly reliable way of getting at its cash value, I shall not permit you to do it. The question is, would any sensible man who wanted to make an investment buy property of that kind upon such a standard of valuation. If he wouldn't, and if there are better ways, we will resort to better ways. We try to take the best way. Sometimes it is very difficult to get at the value of property, but courts are always inclined to insist that you resort to the best available methods of getting at the value. Is there anything further with this witness?

MR. MR. DAVIS: Q. Mr. Enders, I will ask you, at the time the building was destroyed, what its—taking into consideration the purposes for which it could be used and the purposes for which it was used, and its location, and the town it was in, the thing it was being used for, what its actual cash value would be at the time of its destruction by fire.

MR. SHELTON: Objected to, if the Court please.

THE COURT: By that you mean what? What it could be sold for upon the market, or what it could be made to pay?

A. I—

THE COURT: Just a moment. What do you

mean by the question, so that it will be clear, so that we will know what he is answering?

MR. DAVIS: I had probably better ask him first if he has an idea of what it would sell for there upon the market. Was there any market value at Soda Springs for a building of this kind and for this building, at the time it burned?

A. There is a hotel right next adjoining on that lot that they got the—

THE COURT: Just answer the question yes or no.

A. Yes.

MR. DAVIS: Q. Are you familiar with that market value?

A. Yes, sir.

Q. What would you say would be the market value of this place in Soda Springs at the time?

A. Twenty-five thousand.

MR. SHELTON: Objected to.

THE COURT: I think I shall let him answer. It is a question of the weight of his testimony. I am doing this under a decision arising in your state, Mr. Shelton, a Supreme Court decision with which you are probably familiar, that the owner of property may testify as to its value.

MR. SHELTON: Yes, Your Honor.

MR. DAVIS: That is all, I believe. It may be necessary—We are not just sure as to the proper manner of proving that by this witness. We might want to recall him for the purpose of showing or

qualifying him, if he can be qualified. I don't know that he can probably qualify.

THE COURT: He has already answered, hasn't he?

MR. DAVIS: Yes. You may take the witness.

CROSS EXAMINATION.

By MR. SHELTON:

Q. Mr. Enders, at the time of the fire you speak of the occupancy of the building, and I understood you to say that there was a laundry occupying five rooms of the building?

A. Yes, sir.

Q. Was that in the basement?

A. No, sir, that was on the first floor.

Q. It was on the first floor?

A. Yes, sir, and the building was joined on to the main building.

Q. What kind of a laundry was that?

A. Where they wash clothes.

Q. Commercial laundry?

A. Yes, Sir.

Q. Steam?

A. Well, they used hot water more than steam.

Q. A regular commercial laundry?

A. Yes.

Q. How long had that laundry been in that building?

A. For about two years or two and a half years.

Q. And it was there before the insurance policy was issued these policies?

A. Yes, sir.

Q. And was there at the time of the fire?

A. Yes, sir.

Q. Who was the owner of that laundry?

A. Hart is his name.

Q. And he did laundry work for other people around in the town.

A. Yes, sir.

Q. The same as any regular laundry?

A. Yes, sir.

Q. Now referring to this conversation which you speak of, with Senator Clark, at the time of his visit to Soda Springs, when was that, when did that take place?

A. In 1918, about the 20th of July.

Q. In 1918, about the twentieth—

A. Not eighteen—nineteen twenty one.

Q. 1921?

A. Yes.

Q. About the—

A. —twentieth of July.

Q. Twenty-third of July?

A. Twentieth.

Q. The 20th of July?

A. Yes.

Q. 1921?

A. Yes, sir.

Q. Are you positive about that date?

A. Yes, sir.

Q. That it was in 1921, in July?

A. Yes, sir.

Q. When did the fire take place?

A. In 1920, the 7th day of June.

Q. The fire took place—

A. Twenty-one, yes.

Q. The fire took place in June, June 7th, 1921?

A. Yes, sir. Yes, sir.

Q. And your conversation with Senator Clark was in July?

A. Yes, sir.

Q. 1921?

A. Yes, sir.

Q. Now in regard to this conversation with Senator Clark, what did Senator Clark say about this particular deed? As I understood you, he said that that deed—you asked him to have that deed remain in Soda Springs in the bank, is that correct?

A. Yes, sir.

Q. And he said it was all right as far as he was concerned, is that right?

A. Yes, sir.

Q. Had you examined that deed or had your attorneys examined that deed before that time?

A. I went up and got the numbers.

Q. What is that?

A. I went up and got the description.

Q. You went up and got the description?

A. Yes, where it was located, how it was made

out, and then looked it up and found out it was the same property that the building is on.

Q. That was the first conversation. He said the deed might remain there at Soda Springs in the bank, is that right?

A. Yes, sir.

Q. That is, you were to have that deed of that property if and when you paid \$4,000, is that correct?

A. Yes, sir.

Q. And until you paid that \$4,000 the deed was not to be delivered to you?

A. Yes, sir.

Q. You never paid that \$4,000?

A. Not yet.

Q. What?

A. Not yet.

Q. No?

A. The deed is still there.

Q. The deed is still there? It never has been delivered to you?

A. Yes.

Q. You had the option to purchase that property for \$4,000, didn't you?

A. Yes, sir.

Q. And you have never exercised that option, have you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. When?

A. By paying the interest on it, and they give me six years time to pay it in.

Q. I didn't hear.

A. I have got plenty of time to pay it in.

Q. You had, you say, six years to pay it in?

A. Yes, sir.

Q. Then that agreement was that you were to have six years to take up that deed?

A. Yes, sir.

Q. You had an option running over a period of six years?

A. Yes, sir.

Q. That is all there is to it, isn't it?

A. Yes, sir.

Q. Now, when did that six years run from?

A. How is that?

Q. When did that six years run from?

A. From the first of February, 1918.

Q. From the first of February, 1918?

A. Yes, sir.

Q. Well, how did you come to arrive at that statement, that it was to run from the first of February, 1918?

A. Why, that was our agreement.

Q. What agreement?

A. With me and Mr. Kiesel.

Q. With you and Mr. Kiesel?

A. Yes, and he represented the Natural Mineral Water Company; he was talking for the Natural

Mineral Water Company, and he sold this Natural Mineral Water Company property.

Q. But you told Senator Clark that this particular deed, which was dated in 1920, was to remain you wanted it to remain in that bank, in the Soda Springs Bank?

A. Yes.

Q. What?

A. Yes, sir. By the way, before we go any further, Senator Clark was up there in 1920, not 1921.

Q. 1920?

A. Yes, sir.

Q. It was 1920 instead of 1921?

A. Yes.

Q. Then he wasn't there after the fire?

A. No.

Q. Now a little further in regard to that. When did you say you went into possession of this property?

A. In 1918, the first of February.

Q. Who did you take possession from?

A. From Mr. Woodall.

Q. What was his first name?

A. C. T.

Q. He had occupied it before that time?

A. Yes, sir.

Q. Do you know how long he had occupied that property?

A. I don't know how long, but a good many years.

Q. And what had he done with the property?

A. What had he done?

Q. Yes, what had his occupation of it been?

A. He run it as a hotel.

Q. He ran it as a hotel?

A. Yes, sir.

Q. How long have you known that property?

A. About 25 years.

Q. Twenty-five years?

A. Yes, sir.

Q. And do you know when it was built?

A. I think it was built about in '87.

Q. 1887?

A. '87.

Q. 1887?

A. Nineteen eighty-seven—eighteen eighty-seven.

Q. You mean 1887?

A. Yes.

Q. Now, Mr. Woodall, when he turned the property over to you, did you purchase from him the furniture in the house?

A. Yes, sir, what was left.

Q. What was left of it?

A. Yes, sir.

Q. And was the house fully furnished at that time?

A. No, sir.

Q. But that was part of the furniture that was in the house, or was all of the furniture in the house

that was received from Mr. Woodall in there at the time of the fire?

A. Part of it.

Q. Part of it?

A. Yes, sir.

Q. Where had the balance gone?

A. I don't know. The balance had been stolen or he had taken it out. After I bought it from Mr. Woodall his wife come and took out some more, claimed it was hers and Woodall had no business to sell it to me.

Q. This place was occupied, as I understand, by different roomers and apartment people?

A. Yes, sir.

Q. Were they furnishing their own furniture?

A. Some of them had their own furniture, and then I moved my furniture out in some of the rooms that wasn't occupied and stored it away.

Q. That is, your furniture which you had there was stored in some of the rooms that were not occupied by the tenants?

A. Yes, sir.

Q. And how many of the rooms in the building were occupied by tenants who used your furniture?

A. Pretty near all of them, except two of them.

Q. What is that?

A. Pretty near all of them except two.

Q. All of them except two?

A. Yes.

Q. Now you say that after you took possession of the property you made some improvements on it?

A. Yes, sir.

Q. Now when were those improvements made?

A. 1920, the most of them, the biggest ones.

Q. 1920 and 1921?

A. Yes.

Q. Any improvements made in 1921?

A. Yes, there was some made.

Q. Now can you tell what those improvements were?

A. Yes, sir.

Q. You had some kalsomining, papering, and painting, done, on the rooms, did you not?

A. Yes, sir.

Q. Who did that work?

A. Different parties. Mr. Root done the papering and painting.

Q. Did Mr. Root do any of it?

A. Yes, sir. He was one of the men that got the biggest pile of money out of it.

Q. And you paid him for that?

A. Yes, sir.

Q. How much did you pay him?

A. Between fifteen and sixteen hundred dollars.

Q. Where did you get the money to pay him?

MR. DAVIS: If the Court please, I object to that as—

A. I make—

MR. DAVIS: Just a minute.

MR. JONES: Objected to on the ground that it is immaterial.

THE COURT: I hardly see the materiality of it, unless you are questioning the correctness of his statement that he paid that much.

MR. SHELTON: He stated that he had paid some three thousand dollars, as I understood, for these improvements.

THE COURT: Yes.

MR. SHELTON: And I am questioning the correctness of that statement, that he paid the \$3,000.

THE COURT: You may answer.

A. Why, Mr. Root, he owed me interest on a thousand dollars, he owed me a thousand dollars and interest, and then I paid him the difference.

Q. He owed you a thousand dollars and interest?

A. Yes. We have got a piece of paper here to show how he got paid.

Q. And you paid him the difference in cash, that is, the difference between the thousand dollars and the \$1600 that you—

A. Yes.

Q. —mentioned. Now the total amount of your improvements as specified included window glass and lumber and shingles and roofing paper and roofing shingles and putting in glass, and mosquito bar, and plastering, and repairing rooms and plumbing, wire screen for windows, repairing, doors, two new doors, sand for plaster, and hinges and springs, total amount in this statement \$2,021.38.

A. That is what I paid by checks to the people, paid them with checks. Other people that I paid with cash I didn't put that in.

Q. This is the statement which you presented, was it not, to the company?

A. Yes, sir.

Q. As the amount that you had expended on that property?

A. Yes, sir, where I can show a check for it. Where I have paid cash I didn't put that in, because I thought I couldn't show it.

Q. Well, you handed in to the company or the adjusters—

A. Yes, sir.

Q. —in stating the amount, an itemized statement, did you not?

A. Just what I could show the checks for, you know. But those people where I paid the cash I didn't put that in, because I didn't think—

Q. And that statement showed that you had expended \$2,021.38?

A. Yes, sir.

Q. Now you state that you expended \$3,000 or more?

A. Yes, sir.

Q. What was your purpose in making a statement to the adjusters of less than you state now?

A. Because they might get me in the court and want each item where I paid it to, and by putting this down there I could represent each item where

I paid it to, but those people I paid the case, I couldn't represent nothing, just the same as you told me there how did you pay the—where did you get the money from.

Q. That is your explanation, is it?

A. Yes, sir.

Q. Now you say you paid the taxes on this property?

A. Yes, sir.

Q. What was the amount of the taxes that you paid during the year 1920?

A. I don't recollect.

Q. What is that?

A. I don't remember that amount.

Q. Do you remember how much taxes you paid in 1921?

A. We could—I think we can look that up.

Q. Did you turn the property in for assessment?

A. No, sir.

Q. Was the property assessed in your name?

A. I don't know how it was assessed, but I get the notice all the time.

Q. Wasn't the property assessed in the name of the Natural Mineral Water Company?

A. In care of me.

Q. I say, wasn't it assessed in the name of Natural Mineral Water Company?

A. And me, both.

Q. What is that?

A. Also in my name.

Q. Now in whose name was the property assessed before Caribou County was separated from this county, Bannock?

MR. JONES: That is objected to on the ground that that would antedate the time when the policy was written. It would be preceding 1920, too.

MR. SHELTON: If the Court please, the proposition is that this property—

THE COURT: You may go back as far as 1917 with him.

MR. SHELTON: Yes, I was going to—

THE COURT: When was the county of Caribou—

MR. SHELTON: In 1918, I think.

MR. BENTLEY: The last assessment in Bannock County was in 1918, and then subsequently, after that, it was—

MR. SHELTON: Q. In whose name was the property assessed in 1918?

A. In mine and Natural Mineral Water Company.

Q. In the Natural Mineral Water Company and in your name?

A. Yes, sir.

Q. Are you positive of that?

A. Natural Mineral Water Company in care of T. Enders.

Q. What say?

A. My name is on it as well as the Natural Mineral Water Company.

Q. What was the amount of the assessment?

A. I don't remember. I believe we could find that among some of the papers here.

Q. Wasn't the property assessed at \$1500 for the building and approximately \$500 for the lots?

A. I don't remember.

Q. You don't remember?

A. No, sir. But then those assessments was made in the early days, and they never have been raised on the Idanha building.

Q. In whose name was the property assessed in 1917, do you know?

A. In the Natural Mineral Water Company.

Q. And in 1919, do you know that?

A. Natural Mineral Water Company, in care of T. Enders.

Q. 1920, you say in the Natural Mineral Water Company?

A. In care of T. Enders.

Q. What?

A. In care of me.

Q. In care of you?

A. Yes.

Q. And 1921 the same?

A. Yes.

Q. Now isn't it a fact that there never has been an assessment upon that property to exceed, for the real estate and improvements together, two thousand dollars?

MR. JONES: This is objected to on the ground that it is incompetent, irrelevant, and immaterial, and not the proper method of proving values of real estate or of buildings.

MR. SHELTON: I am trying to find out the witness's recollection, if the Court please, on cross examination.

WITNESS: It sure couldn't have been assessed that low. I have paid—

MR. JONES: Will you quit talking a little.

THE COURT: You have got to give your attorney a chance to talk a little.

MR. JONES: We want a ruling on that.

THE COURT: You went into this matter of the payment of taxes, Mr. Jones.

MR. JONES: Merely as to who paid the taxes, but not for the purpose of showing value of the real estate. If they are going into it for the purpose of asking him whether he did pay the taxes, we have no objection, but it appears from these questions that he is attempting to offer evidence as to the value of the building, by the assessment. That is our objection.

MR. SHELTON: Did you answer?

WITNESS: I don't know what you asked.

MR. SHELTON: What?

WITNESS: What was it you asked me?

MR. SHELTON: I asked you if it wasn't a fact that that building and the property upon which it stood had not been assessed at any time between

1917 and 1921 as a greater valuation than two thousand dollars.

MR. JONES: The same objection.

THE COURT: Well, the testimony will not be taken as evidence of value.

MR. SHELTON: Oh no, Your Honor. I don't ask it as evidence of value. I am trying to find out his recollection of the situation.

THE COURT: Of course you put in the matter here of his paying taxes. Now if the taxes are only nominal the fact might have one significance, whereas if the taxes were very heavy it might have another. I suppose that counsel upon one side are trying to show that he had a very substantial interest in this property, and on the other side that he had very little interest in it. I think I shall let him answer, but with the understanding that the assessed valuation is not the criterion or is not the measure of the actual cash value of the property. Now you may answer the question. Do you know of any year when all of this property, that is, the building and the lot upon which it is located, do you know of any year when the assessed value was in excess of two thousand dollars?

A. I don't remember how much it was assessed.

THE COURT: Very well.

MR. SHELTON: Q. Now, Mr. Enders, you verified these complaints, did you not? Perhaps I had better have the original complaint.

THE COURT: The original is not here, because the transcript came up from the state court.

MR. SHELTON: Q. I show you the complaint, a copy of the complaint which was filed in this case, which says, "Theodore Enders being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above entitled cause, and that he has read the above and foregoing complaint, and knows the contents thereof, and the facts therein stated are true as he believes." You verified that, did you? Did you swear to that complaint or not?

A. I swore to the complaint—

THE COURT: It proves itself, gentlemen. There is no use taking the time for that.

MR. SHELTON: Q. Now I wish to call your attention to the following statement in the complaint.

MR. JONES: What paragraph?

MR. SHELTON: It is in paragraph 4, and it is down towards the bottom of the page. "That the Fred J. Kiesel estate was not the mortgagee or trustee of said property and did not at that time, nor has not at any time since the issuing of said policy, had any interest whatever in or to said insured property, and that the proceeds due under said policy are due and payable to plaintiff." Do you make that statement?

A. Yes, sir.

Q. Is that a fact?

A. That is the truth.

Q. Now in the affidavit of your proof of loss, which you have identified, and which is marked Exhibit 16, you make this statement: "That the Kiesel Estate has and holds an interest in said property as security in the sum of about \$5400."

A. That should read, the Natural Mineral Water Company. That is an error of Melvin, the attorney. That should read Natural Mineral Water Company.

Q. Then this is not true?

A. It should read Natural Mineral Water Company.

Q. I say, is that true or is it not, that statement that the Kiesel Estate has an interest as security in that property, to the extent of \$5400, is that true or not?

A. It is not.

Q. It is not true?

A. No.

Q. Then this affidavit to that extent is false?

THE COURT: That is argument.

MR. JONES: Objected to.

MR. SHELTON: That is argument, yes, Your Honor.

Q. Now going on to another proposition. The title to this property was in the Natural Mineral Water Company, was it?

A. It is in my name.

Q. I say it was in the Natural Mineral Water Company?

A. Yes, sir.

Q. And the only interest which you had is by virtue of that agreement with reference to that deed?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now referring to an exhibit, I showed you Exhibit 5, which reads:

“Butte, Montana, May 11, 1920.

Mr. Theodore Enders,

Soda Springs, Mont.

Dear Sir:

We are in receipt of a deed from the Natural Mineral Water Company, conveying to you the north half of lot 4, and all of lot 5, in block 38, Soda Springs, Caribou, Co., Idaho, to be delivered to you on payment of \$4,000.00. On receipt of the above amount we will forward the deed to you. Yours truly, J. K. Heslet, Asst. Cashier.”

And later, in Exhibit 6:

“Butte, Montana, June 14, 1920.

The Bank of Soda Springs,

Soda Springs, Ida.

Dear Sirs:

Enclosed I hand you herewith deed from the Natural Mineral Water Co. to Theo. Enders, for inspection of Mr. Enders' attorney. After Mr. Enders and his attorney have inspected the deed, kind-

ly return the same to us, with a statement of your charges in the matter, and greatly oblige.

Yours very truly,

J. K. HESLET, Asst. Cashier."

Now the deed to which you have referred and which is mentioned in those letters is this deed, is it not?

A. Yes, sir.

Q. And that is the only deed that has been executed in connection with this property, so far as you are concerned?

A. Yes, sir.

Q. And that deed is in the bank at Soda Springs at this time, or in the custody of Mr. Torgesen, under those letters, is that not so?

A. That has been changed.

Q. Changed by leaving the deed there?

A. Yes, sir.

Q. Instead of returning it to Mr. Clark, as requested by Mr. Heslet?

A. Yes, sir.

Q. That was the only change?

A. Yes, sir.

Q. Was there ever any contract or arrangement in writing presented to you by the Kiesel estate or by Mr. Kiesel with relation to this property?

A. I haven't seen any.

Q. You never saw any?

A. No.

Q. Was there ever any contract presented to you for your signature?

A. Not that I remember.

Q. You don't remember any such contract?

A. No.

Q. Did Mr. Shearman ever send you any contract to be signed?

A. Mr. Shearman has told me about that he did send a contract, and I told him I didn't receive it.

Q. You told him you didn't receive it?

A. No.

Q. As a matter of fact, didn't you tell him that the reason why you hadn't answered his letter and signed the contract was because you were out of town or away?

A. Not that I remember.

Q. Now, Mr. Enders, you say you had this conversation with Senator Clark in July, 1920?

A. Yes, sir.

Q. Didn't you write to Mr. Shearman and state, "I received your letter and also contract in connection with the Idanha Hotel—

MR. JONES: Just a moment. We object to it as an improper form of cross examination, reading from a letter without offering the witness the letter, letting him see it.

THE COURT: Perhaps you would better let him see it.

MR. SHELTON: I haven't the original letter, if the Court please; I have only a copy of it.

THE COURT: Show him the copy.

MR. SHELTON: Q. Did you write that letter,—that is a copy—to Mr. Shearman?

A. Yes. That contract from Mr. Shearman—

Q. Did you write a letter of which that is a copy, to Mr. Shearman?

A. Yes, I got the money from Mr. Shearman.

Q. I asked you, did you write the letter of which that is a copy, to Mr. Shearman?

A. Yes, sir.

Q. You wrote that letter?

A. Yes, sir. But this hasn't got nothing to do with the Natural Mineral Water Company.

Q. What did you mean in that letter when you said, "I received your letter and also contract in connection with the Idanha Hotel?"

A. Mr. Shearman, he loaned me some money to pay what I owed on the Idanha Hotel.

Q. He what?

A. I got some money from him what I paid on the Idanha Hotel.

Q. You got some money from Mr. Shearman?

A. Yes, sir.

Q. To pay on the Idanha Hotel?

A. Yes, sir.

Q. How much did you get from Mr. Shearman?

A. Oh, about \$2800.

Q. \$2800?

A. Yes.

Q. And that was from the Kiesel Estate, was it?

A. It was from Mr. Shearman.

Q. From Mr. Shearman personally?

A. Yes, I think so.

Q. And that is the contract that you refer to there?

A. Yes.

Q. Now will you examine that letter and see if that is the letter which you received from Mr. Shearman, a copy of the letter which you received from Mr. Shearman, with relation to this matter, to which that is an answer.

A. Yes, I received this letter.

Q. You received this letter?

A. Yes.

Q. And then this letter which you received from Mr. Shearman, and this is the answer to it, is it not?

A. No. Mr. Shearman, I wrote to him.

MR. JONES: We don't get—if the Court please, we can't see the materiality of these letters, and we would like to have counsel fix this so that we can make an objection, if there is objection to it.

THE COURT: He will show you the letters, I presume, before he offers them in evidence.

MR. SHELTON: Yes, Your Honor. I will ask to have the first letter that he identified marked.

Two separate papers were marked

DEFENDANT'S EXHIBITS NO. 20 and 21.

Q. Now this is the first letter that you identified as a copy of your letter, is it not?

THE COURT: Referring to what exhibit?

MR. SHELTON: That is Defendant's Exhibit 20.

THE COURT: That is your letter, is it, to Mr. Shearman?

A. Yes.

MR. SHELTON: Q. And this, Defendant's Exhibit 21, is Mr. Shearman's letter to you?

A. Yes, sir.

Q. Now I offer you another letter. Did you receive that letter from Mr. Shearman?

THE COURT: Referring to Defendant's Exhibit 22 now?

MR. SHELTON: Referring to 22. I will have it identified in a minute.

A. Yes, sir.

MR. SHELTON: I will ask the clerk to identify it.

Said letter was marked,

DEFENDANT'S EXHIBIT NO. 22.

MR. SHELTON: If the Court please, at this time counsel for the plaintiff calls my attention to an omission in the letter of October 12, 1920, which was left out, and counsel have a correct copy of that letter, and I will ask them if they will produce that copy so that I can use it in connection with my cross-examination.

MR. JONES: May I inquire at this time if they are offering copies or something that they have obtained themselves, and have gone through the files? They haven't offered the originals, and they

haven't demanded the originals, but we want to know whether this is simply a made-up copy by the adjusters, taking such portions from Mr. Shearman as they want to put in evidence. It does not conform to the letter itself, but they are asking Mr. Enders whether he received it. We are going to object to introducing copies, unless it is done according to the rules of evidence.

MR. SHELTON: We are asking them to produce the copy which they have, or the original. It is in their possession, if the Court please.

THE COURT: Well, of course, gentlemen, if you have the original you should produce it.

MR. DAVIS: Of course, if the Court please, we don't know that there ever was such an original. It appears that the adjusters of this company went to Mr. Shearman's office and went through all this correspondence, and they took such portions as they wanted, and they offer copies—

THE COURT: It is unnecessary to discuss it. If you haven't the original—

MR. DAVIS: No, we haven't the original.

MR. SHELTON: They have a copy there, and if they will call my attention to the omission in the copy which we have, and I ask them for it so that we can use it on cross-examination.

THE COURT: Unless they agree that it is a copy, of course I can't compel them to produce it.

MR. DAVIS: We don't know, Your Honor. And furthermore, we object to the cross-examination of this witness—

THE COURT: There is nothing to object to. There is nothing before the Court.

MR. SHELTON: Q. Now, Mr. Enders, on this Exhibit 21, dated October 12, 1920, the letter which you have identified, a copy of which, signed Fred J. Kiesel Estate by W. H. Shearman, "In accordance with Mr. Clark's suggestion"—

MR. SHELTON: I think I ought to read this to the jury, if the Court please. I offer these in evidence as identified, and I will offer them to counsel.

THE COURT: Well, he has seen them, has he not?

MR. DAVIS: Only one of them, Your Honor.

MR. SHELTON: I offer them all in evidence, those three.

MR. JONES: As I understand, these don't purport to be the originals or copies of originals.

MR. SHELTON: They purport to be, as far as I know.

THE COURT: The witness has identified them, and they may go in unless there is some other objection. The witness has identified them as a copy of a letter he wrote, and a copy of a letter he received.

WITNESS: But they ain't all there.

MR. JONES: We would like to ask the witness. Do you know, Mr. Enders, whether Defendant's Exhibit No. 21 is a copy of a letter you received from Fred J. Kiesel or from W. H. Shearman?

THE COURT: Oh no, you can't ask him that question. He has already stated that it is.

MR. JONES: It is demonstrated that it isn't either a copy or the original, and it isn't correct.

THE COURT: No. I won't permit you to do that after a recess of the Court. You can't, after conferring with him, get him to state just the contrary of what he already stated. If there is any correction to make, you can make it later on.

MR. JONES: We object to these letters, the introduction of Defendant's Exhibit 21, on the ground and for the reason that counsel for the defendant has already admitted into the record in this case that this is not either the original or an exact copy, and that he has discovered since the recess hour that it was not the original or an exact copy.

THE COURT: The objection is overruled.

MR. JONES: And the same objection as to each of these other two exhibits.

THE COURT: Overruled.

MR. DAVIS: Might I add the objection, on the ground that it appears that these were instruments received from the confidential files of Mr. Enders' agent acting in this matter of the adjusting of the loss by Mr. Shearman, and that the insurance companies have already received these in-

formations, and it does not appear that they made any objection to the state of the title when they received them into their possession, and they are estopped now to question them upon the trial of this cause.

THE COURT: Overruled.

MR. SHELTON: I will read these to the jury, if the Court please.

DEFENDANT'S EXHIBIT NO. 21.

"October 12, 1920.

Mr. Theo. Enders,
Henry, Idaho,

My Dear Mr. Enders:

In accordance with Mr. Clark's suggestion, I forwarded you herewith agreement in duplicate in connection with the sale to you of the Idanha Hotel.

As soon as you have signed both the original and duplicate of the agreement, which please have witnessed, return them to me, and I will send them to Mr. Clark for his signature, and they will then be placed in the Soda Springs Bank.

Your prompt attention to this will be appreciated.

With very kind regards to you personally, I am,

Yours very truly,

(Signed) FRED J. KIESEL ESTATE,
By W. H. Shearman."

DEFENDANT'S EXHIBIT NO. 22.

"October 20, 1920.

Mr. Theo. Enders,
Henry, Idaho,

My Dear Mr. Enders:

I wrote you some days ago sending you duplicate contracts in connection with the Idanha Hotel property but have not heard from you. I fear the letter has gone astray.

I should be glad to have you drop me a line in regard to the matter.

Yours very truly,

(Signed) FRED J. KIESEL ESTATE,

By W. H. Shearman."

DEFENDANT'S EXHIBIT NO. 20.

"October 26, 1920.

W. H. Shearman,
Ogden, Utah,

My Dear Friend:

I received your letter and also contract in connection with the Idanha Hotel. The reason I haven't answered is I wasn't home. I shipped stock to Omaha and lost. Mr. Shearman, times are awfully hard, and I make good as soon as I can. I am on a deal and the man, Mr. Christensen, says it will be a month before he will have any money, so you will see that I am in need of time. Should he fail, I will place a mortgage so I can pay my bills.

Hoping you will grant me time, I remain,

(Signed) THEO ENDERS."

MR. SHELTON: Q. What did you do with the contracts which were enclosed in that letter to you in regard to the sale of the Idanha Hotel?

A. I got no contract—I got them contracts from the Idanha Hotel.

Q. What did you do with them?

A. I got them.

Q. You never signed them?

A. No, sir.

Q. You never returned them to Mr. Kiesel?

A. No, sir.

Q. That was dated in October, 1920, was it not?

A. I don't remember the date.

Q. And it was after your conversation with Senator Clark, which you have told to the jury here took place in July, 1920?

THE COURT: That is argument. That appears.

MR. SHELTON: That appears, yes.

Q. Now, taking up this affidavit which you signed with reference to the indebtedness to the Kiesel Estate, Plaintiff's Exhibit 16, you say that you owed \$5400 to the Natural Mineral Water Company?

A. I told my attorney—

Q. I told my attorney—what did you say?

A. I told my attorney how we stood, and he made—

Q. I say, did you owe \$5400 to the Natural Mineral Water Company?

A. I think so.

Q. What for?

A. For different things.

Q. Various things. Was it to the Mineral Water Company or the Kiesel estate or Mr. Shearman personally?

A. Well, I think he mixed that up.

THE COURT: No. The question is, what is the fact now?

A. I owed the Natural Mineral Water Company four thousand dollars at that time.

THE COURT: Proceed with your cross-examination.

MR. SHELTON: Q. Then where was the other \$1400?

A. That belongs to the other party.

Q. What other party?

A. Mr. Shearman.

Q. Did you owe Mr. Shearman personally?

A. Yes, sir.

Q. So you owed the Natural Mineral Water Company, you owed Mr. Shearman personally \$1400. How much did you owe the Kiesel estate?

A. Well, the Natural Mineral Water Company is in fact—I don't know that I have to do with Kiesel estate.

Q. What say?

A. I haven't got nothing to do with the Kiesel estate.

Q. Didn't you owe the Kiesel estate anything?

A. No.

Q. No. this \$2800 which you got from Mr. Shearman—

A. This has nothing to do with this.

Q. When did you get that \$2800?

A. I don't remember—I don't remember the date.

Q. Do you owe that yet?

A. No.

Q. What?

A. No. We settled that up.

Q. When did you settle that up?

A. About six months ago.

Q. Six months ago, after the fire. How did you settle it?

A. Give him a check.

THE COURT: That was for \$2800, you mean?

A. Yes, sir.

MR. SHELTON: Q. The \$2800 you refer to you said was money that you used in connection with this Idanha Hotel, to pay for the Idanha Hotel, is that true?

A. I used part of it.

Q. What say?

A. I used part of it.

Q. Used part of it to pay for the Idanha Hotel?

A. Part of it.

Q. To whom did you pay that?

A. Why, I don't remember to who I paid that. I think it was some improvement.

THE COURT: A little louder.

A. I think it was some improvement I made and paid it, in different places.

MR. SHELTON: Was it part of this \$4,000?

A. No. It hasn't got nothing to do with this \$4,000.

Q. It had nothing to do with that at all?

A. No,—different.

Q. An entirely different matter?

A. Yes, sir.

Q. Weren't the improvements that you speak of there all paid for by Shearman or the Kiesel estate?

A. I paid them out of my own pocket, that is, and the money that I borrowed.

Q. And the money you borrowed?

A. Yes. Of course I took the biggest part of the money and paid it on the Enders Hotel.

MR. JONES: That is, the biggest part of this \$2800 was applied on the Enders Hotel, is that what you mean?

A. No. I applied about \$2,000 on the Enders Hotel, what I borrowed from Shearman.

Q. Now speaking a little further—you spoke of \$300 which you expended on putting shingling and roofing on the hotel?

A. Yes.

Q. You have here two items, \$31.50 roofing paper, and roofing and shingling, \$34.

A. Yes, sir.

Q. Those are the items you refer to?

A. No, sir.

Q. Other items?

A. Other items. That is one more he leaves in Salt Lake.

Q. When did you put that other—

A. Item?

Q. Items on?

A. About three weeks later.

Q. What?

A. About two or three weeks later, after this fellow fixed the roof there. He fixed half the roof, and then later on the other fellow come and I got him to fix the other half.

Q. That is, two or three weeks after you had put in this bill?

A. No.

Q. Or this statement?

A. No.

Q. What do you mean then?

A. I mean it was fixed the year before.

Q. It was fixed the year before?

A. Yes, sir.

Q. That is, these items—

A. Yes.

Q. Were for the year 1920 and 1921?

A. Yes, sir.

Q. The item which you speak of was the year before?

A. No, that was for 1920.

Q. Two or three weeks before that. I don't un-

derstand you, Mr. Enders. I am trying to get at the fact. What is the fact?

A. This fellow what fixed the roof, where you have just been reading about, he fixed part of the roof, and that is all the time he had to fix, so I give him a check and he went on, and two weeks after, another fellow come, and he says he got time, and he want to fix the balance of that roof, and I says, "Go on and do it," and then of course he fixed it. And I met him down at the garage, and he wanted so much money, and I just give him the cash for it.

Q. Now what was his name? Who was the man?

A. I don't know the name of neither one of them.

Q. Then as I understand you that item was before this, was it?

A. What?

Q. That item for fixing the roof was done prior to these two items which you have included in your statement?

A. That was done about the same time, you know.

Q. It was done about the same time?

A. Yes.

Q. Why didn't you put them into this statement?

A. Because I couldn't swear to it. I couldn't show any proof, because he had the cash.

Q. You didn't know what it was?

A. Yes, I know what it was.

Q. Then why didn't you put it into this statement?

A. Because I didn't give him any check.

Q. You didn't give him any check?

A. No.

THE COURT: What was the amount of the item?

A. About \$310.

THE COURT: No—this last item?

A. What item?

THE COURT: You mean this man you say came along about two weeks later and wanted to to this work, and he did some work for you?

A. Yes, sir.

THE COURT: And then you say you met him at the garage and he wanted some money?

A. Yes.

THE COURT: How much did you pay him?

A. \$300.

THE COURT: You mean to say you paid him \$300 in cash?

A. Yes, sir.

THE COURT: And took no receipt?

A. No.

THE COURT: And don't know his name?

A. No, sir.

MR. SHELTON: Q. Where did you get the money?

A. I went up to the bank and got it.

Q. Where did you get the check?

A. I know he wanted the money. I went to Largellier's bank and got the money for him.

Q. Why didn't you give him a check on the bank?

A. Because I had that money in my pocket, and I went after that money for him, because he was a stranger here and didn't want the check.

THE COURT: And you didn't take any receipt?

A. No, sir.

THE COURT—Proceed.

MR. SHELTON: Q. Now going back a little into this contract for this property. Have you signed any contract in regard to this property since the fire?

A. I didn't exactly catch on.

(Question read.)

A. Not that I know of. You mean have I sold it to anybody else?

Q. Have you signed any contract, entered into any written contract with relation to this particular property, where the Idanha Hotel stood, since the fire?

THE COURT: Have you signed any contract in relation to that hotel property, that is, have you signed any since the fire occurred?

A. I don't remember.

THE COURT: He says he doesn't remember.

MR. SHELTON: Q. Have you had any busi-

ness relations in regard to it with Mr. Shearman since the fire?

A. Mr. Shearman, he is supposed—I told him to take the matter up with the company and take my part, represent me.

Q. That is, with regard to the different adjustments of the insurance?

A. Yes.

Q. And that is all, is it?

A. I don't know.

MR. SHELTON: I guess that is all.

RE-DIRECT EXAMINATION.

By MR. JONES:

Q. Mr. Enders, you stated, I believe to counsel, that you had an option on this hotel. Do you know what an option is?

A. When you buy—enter in with a fellow and make an agreement with him and buy it, and you pay so much money for it, and then the second time come, and if you don't pay it he make you pay it, just like you go down in the store and get some groceries and you take them home, and he want his money, and you don't pay him, and he sue you for it.

Q. Your agreement with the Natural Water Company is as you have related it here in the conversations you had, is it not?

A. I didn't understand.

Q. You have already related what the agreement was between you and the Natural Mineral

Water Company, by detailing these conversations and by the letters that you received?

A. Yes, sir.

Q. Did you ever sign a contract that Shearman sent you under any letter?

A. No, sir.

Q. Did you ever have any other or different arrangement than you had with Mr. Kiesel and Mr. Clark at Soda Springs?

A. No, sir.

THE COURT: Why didn't you sign that agreement Mr. Shearman sent you?

A. It runs to Mr. Clark, the Natural Mineral Water Company.

THE COURT: Is that the only reason you didn't sign it?

A. It contradict itself with the agreement I had made. It didn't correspond with the agreement I had made with Mr. Kiesel.

MR. JONES: Q. With Mr. Kiesel, and later with Mr. Clark?

A. Yes. He—

Q. Well, that's all. Do you know where this man is that you stated you paid \$300 to, whose name you couldn't recall?

A. Why, maybe Mr. Falkenberg knows the man.

Q. Was he around in Soda Springs afterwards?

A. Yes, he sent him to me.

Q. Mr. Falkenberg did?

A. Yes.

Q. That is the contractor?

A. No, he is—

Q. Well, Mr. Falkenberg?

A. Yes.

Q. The laundry you speak of in the building, was that used during the time that you have been operating the hotel, to take care of the hotel linen?

THE COURT: That is leading, Mr. Jones, and it is inconsistent with the statement he made.

MR. JONES: Well, it is apparent that this witness is not an educated man.

THE COURT: No, but that is the very reason why he shouldn't be asked leading questions.

MR. JONES: Q. You may describe how this laundry was used, that was in the building.

A. Why, to do our washing for the hotel, and the woman does the washing for the house.

Q. And was there any other washing done other than the washing that was required for the hotel purposes?

A. The hotel people, they gave them laundry. If you were there and wanted your shirt washed you would take it to the laundry, and of course get the extra money for it.

Q. You own the Enders Hotel also, do you not?

A. Yes, sir.

Q. And did the laundry that was in the Idanha Hotel take care of the linen from the Enders Hotel too?

A. No, sir. We didn't want to mix that up at all. That was separate. We kept it separate.

Q. Where was that laundry taken care of?

A. That was shipped down to Pocatello. The laundry wasn't big enough to take care of them.

Q. What kind of a laundry did you have in the hotel?

A. Oh, just a woman doing the washing there, and maybe her boy helped her.

Q. And did she take in people's washing?

A. Well, she—the people, you know, in the hotel—you go in the hotel, and they say, "Here, can you wash that shirt for me."

THE COURT: Did she take in washing from the outside?

A. I guess she would take in a little once in while, you know.

MR. JONES: Q. Where was the principal linen for laundry work obtained?

A. From the hotel.

MR. JONES: That is all.

RE-CROSS EXAMINATION.

By MR. SHELTON:

Q. It is a fact, Mr. Enders, that after the Idanha Hotel burned, that the laundry there was moved to the Caribou Hotel, was it not?

A. Yes, sir.

Q. And continued there until the Caribou Hotel burned?

A. Yes, sir.

THE COURT: Did he say the Caribou Hotel was his other hotel?

MR. SHELTON: That is another hotel.

MR. JONES: He didn't say it was his hotel.

THE COURT: Your other hotel is the Enders hotel?

A. The Enders Hotel, yes, sir.

THE COURT: And the Caribou Hotel is run by still another person.

A. Yes, sir.

MR. SHELTON: That is all.

MR. JONES: That is all.

MR. JONES: If Your Honor please, we have served, and did serve, in compliance with Your Honor's order, a copy of the proposed amendment on counsel for defendant, at the noon hour, or shortly after the noon hour, and lodged one with the Clerk, and of course I take it the Court hadn't wanted it filed yet, but that is the status of it. We ask that the same be filed.

THE COURT: Very well.

MR. SHELTON: I have been actively engaged, if the Court please, in Court today, and haven't had an opportunity to examine it, but I understood your honor will permit it to be filed. And if Your

Honor will grant me perhaps until—to prepare a reply to it, or an answer.

THE COURT: It will be deemed denied. Let your record show that the amendment is deemed to be denied, by agreement of counsel.

MR. DAVIS: Call Mr. Shearman.

W. H. SHEARMAN, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Mr. Shearman, did the Kiesel estate on April 27, 1921, have any interest as mortgagee or otherwise in the Idanha Hotel?

A. No, sir.

Q. Or any time since have they had any interest?

A. No.

Q. Nor have none now?

A. No.

Q. Mr. Shearman, calling your attention to Defendant's Exhibits 20, 21 and 22, are those copies of letters that were in your files, with the exception of the one attention was called to here, where the copy wasn't made exact off of the copy?

A. I couldn't say; I haven't compared them.

Q. Who did you furnish these to?

A. Mr. Egan, one of the employes of Croxford & Young.

Q. Did you turn over your files, entire files and correspondence with reference to the dealings between the Natural Mineral Water Company and Kiesel Estate with Mr. Enders?

A. Everything we could possibly find out that bore on the case we turned over.

Q. And they had free access to those?

A. Yes, sir.

Q. Did they at any time upon examining them or making copies, make any objection to you to any of the matters which they found?

A. No, sir.

MR. SHELTON: Objected to as entirely irrelevant and incompetent.

THE COURT Sustained.

MR. DAVIS: Q. Now, Mr. Shearman, with reference to the contract that you sent Mr. Enders, I call your attention to the conversations that I asked you concerning this morning, or this afternoon, between you and Senator Clark, when Mr. Enders was not there, to which objection was sustained. Did that conversation have to do with the contract that was later sent to Mr. Enders?

A. Yes, sir.

Q. Was that after Mr. Enders and Mr. Clark had ceased talking about the deed in the Soda Springs Bank that day at Soda Springs?

MR. SHELTON: If the Court please, I object

to this as entirely improper and irrelevant and incompetent.

THE COURT: I don't really see the materiality of it.

MR. DAIS: I merely wanted to show, Your Honor, that after this agreement, that Mr. Enders had nothing to do with the signing of the contract, and that is the reason he didn't sign it, that after Mr. Clark left he then suggested to this man that maybe they had better make a little different arrangement, and he then sent another contract up to Mr. Enders, which I understand are the facts of what actually happened. Perhaps I didn't make myself clear. Counsel calls my attention—Clark and Mr. Shearman, after Clark had met Enders, when Enders was not there, had further conversation, and decided to submit another contract that Mr. Enders had not at that time agreed to, and that this is the one later submitted, and it was a different proposition than that agreed on when they left Mr. Enders at Soda Springs that day.

THE COURT: Where is this contract?

MR. DAVIS: No one seems to know. Have you a copy of it?

A. No, sir.

Q. Did Mr. Enders ever sign that contract?

A. He never returned it to me, if he did.

Q. Did he ever sign it and return it to you?

A. No, sir.

Q. Did Mr. Enders ever sign any coneract with

you except such as related—at any time since that time, with reference to the Natural Mineral Water Company?

A. No.

Q. You say you sent it at Mr. Clerk's suggestion. When did Mr. Clark make the suggestion to you to send the contract, with reference to the time Mr. Clark had talked to Mr. Enders at Soda Springs?

A. Mr. Clark didn't really make the suggestion. It was my own suggestion, to which he assented.

Q. What was that suggestion?

A. Mr. Clark told me it really didn't make much difference—

MR. SHELTON: I object to this, if the Court please.

THE COURT: Overruled.

A. Mr. Clark told me it didn't make much difference when Mr. Enders paid the money and took up the deed, provided everything was understood correctly. I suggested that I thought it might be a good idea if we could persuade Mr. Enders to pay a little now and then, not only to cut it down, but to keep him well in hand, it would be a good idea if we could get a few hundred dollars a year, and Mr. Clark said, "Why, that's all right, I think that would be a good idea. You go ahead and see if you can get him to do that."

Q. And it was following out that that you sent—

A. Following that out, I wrote up these contracts myself, and sent them to Mr. Enders.

Q. Was Mr. Enders there when you and Mr. Clark had this conversation?

A. No, sir.

Q. And Mr. Enders never returned the signed contract to you, at any rate?

A. No.

THE COURT: Did he ever explain why he didn't?

A. No, I don't remember, Your Honor, that he did.

Q. Now, Mr. Shearman, do you remember when the Idanha Hotel burned?

THE COURT: Remember what?

MR. DAVIS: When the Idanha Hotel burned.

THE COURT: There is no question about that, is there? You don't question it?

THE SHELTON: Absolutely not. It burned up on the 7th of June, 1921, if the Court please.

MR. DAVIS: Q. How long after the burning of the Idanha Hotel before you saw Mr. Enders?

A. A few days, I think about the 12th.

Q. And how long after that before you saw either Mr. Young or Mr. Croxford, of Croxford & Young?

A. I can't fix that date exactly. I think it was along toward the end of the month, end of June, or prior to the end of June, but I am not certain.

Q. And where was that?

A. That was in their office in Salt Lake City.

Q. What did you go to see them in their office in Salt Lake City about?

A. About the adjustment of the loss on the Idanha Hotel.

Q. And at whose request did you go?

A. Mr. Enders' request.

Q. You were representing Mr. Enders there? You went as Mr. Enders' representative, to help him in settling it up?

A. I went because he asked me to go.

Q. Did you ever take this matter up with William H. Jackson, Jr., the party who issued the policies, countersigned the policies in this case?

A. Yes, sir.

Q. Did you ever receive a letter from him with reference to this matter?

A. I did.

A certain letter was marked,

PLAINTIFF'S EXHIBIT NO. 23.

Q. Handing you Plaintiff's Exhibit No. 23, is that the letter you received from Mr. Jackson?

A. Yes, sir.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 23.

MR. SHELTON: We object to it, if the Court please, as incompetent and immaterial. The agent of the company for the issuance of policies has no authority whatever to bind the company.

THE COURT: I will hear you upon the general subject later. It may go in.

MR. DAVIS: Plaintiff's Exhibit 23: (Reading)
PLAINTIFF'S EXHIBIT NO. 23.

"WILLIAM H. JACKSON, Jr.
LOANS, REAL ESTATE,
INSURANCE.

Pocatello, Idaho,
June 15th, 1921.

Fred J. Kiesel Estate,
Col. Hudson Bldg.,
Ogden, Utah.
Gentlemen:—

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, Jr.

By R. D. Hoskinson."

WHJ-h

MR. DAVIS: Q. Now, Mr. Shearman, will you relate your conversation with Mr. Young on this date that you referred to?

A. I went down to their office, and I was under the impression that I saw Mr. Croxford there first,

but as long as he was in Europe I certainly was mistaken, and who the man was that told me that Mr. Young had just been up there, or was making the adjustment, I don't remember. I know nearly all of them in that office. I thought it was Croxford. So then I talked to Mr. Young. Of course I was anxious to know all about it. I asked him what kind of a loss they had had, and he said it was a total loss, everything had burned to the ground, and I asked him what caused the fire, and then he stated to me he thought Enders had had a hand in it. He said that he had been there and found that Enders didn't have a very good reputation, that he was very heavily involved, that he had insured the building for more than it cost him, that he had said he owned it and he didn't have title, and that it was mortgaged, and that he was under the impression or he felt from his investigation that Mr. Enders had had a hand in burning down the building. I told him I had known Mr. Enders several years, and that certainly surprised me, that nothing could make me believe that, no matter how hard up Mr. Enders was that he was the kind of a man that would do a thing like that. I told him that while Mr. Enders might not have title, he bought the building and had been in possession of it, and—

MR. SHELTON: If the Court please, I object to these self-serving declarations, as immaterial and incompetent. The witness is going on with an extensive conversation between himself and the ad-

juster which has nothing whatever to do with this case, and is in no way connected with it.

THE COURT: Sustained. I assume in this amendment you have pleaded certain statements made upon both sides, and of course your proof will be confined to what you have pleaded in that respect.

MR. DAVIS: All right.

Q. What else was said there, Mr. Sherman?

A. I told Mr. Young that all the transactions took place through the office of the Fred J. Kiesel Company, through Mr. Kiesel.

MR. SHELTON: Just a minute. I think if they are going to interrogate the witness in regard to this matter they should interrogate him according to the amendment which was presented here.

THE COURT: Yes. I thought you understood that, Mr. Davis, that you were to confine the inquiry to matters that you have alleged.

MR. DAVIS: I thought I was doing that, Your Honor. I was trying to. I took it that the main allegation, the general allegation that he didn't object to, Your Honor; he only objected to the first portion of it, and they had us set out certain times. I take it, with reference to the other allegations, of waiving them, and so acting as to get them to furnish proofs and things, are competent under the other part of it. Of course I didn't ask him to relate just the very first things, but I thought that all of his negotiations with them were entitled to go in. The

only part of the amendment they objected to was the one paragraph at the top, because we didn't say who, within that sixty days, he talked to in the Salt Lake office and what representations they made that induced him to believe that he didn't need to make further proofs, but not that we would be precluded with that, because the rest of our amendment goes into the whole proposition, and the main complaint goes into the proposition of them waiving further proofs?

THE COURT: What allegation are you relying on now?

MR. DAVIS: On the portion of the allegation, Your Honor, that states that there was a total loss of the property, and that this man talked to him in behalf of Enders, and told him that he was there representing—

THE COURT: Are you reading from the complaint?

MR. DAVIS: I am not reading from it. I am just carefully referring to it here.

THE COURT: Well, what is it?

MR. SHELTON: I have the amendment there, if the Court please (handing paper to Judge).

THE COURT: Now you may ask him any question within the averment—you mean the amendment you have proposed, don't you, Mr. Davis?

MR. DAVIS: Yes, Your Honor.

Q. Did you advise them there that you came at the request of Mr. Enders?

A. Yes.

Q. Did you advise Mr. Young? Now was anything—What did you advise Mr. Young with reference to furnishing proofs?

A. I told him that the—

Q. State the conversation with reference to that part of it.

A. I told him that the transactions had been—had gone to the office of the Fred J. Kiesel Company, and that we would be very glad to furnish them any documents or proofs or anything that they required.

Q. And what did he tell you?

A. He told me that if they needed anything that he would call upon me.

Q. What did he tell you with reference to whether he wanted anything then or not, at that time?

A. I don't think he asked me for anything at that time; I am not quite certain.

Q. Did he later call upon you for information?

A. Several times.

Q. Did you give them that information?

A. Yes, sir.

Q. Was there ever any objection made to that information?

MR. SHELTON: Objected to, if the Court please.

THE COURT: Sustained.

MR. DAVIS: Q. But you did give them all the information that they asked you for?

A. I did, and they also asked me to get information from Mr. Enders, which I did.

Q. Did you communicate to Mr. Enders the result and the substance of your first interview with them there?

A. Yes.

Q. And did you communicate with him the substance of the letter you received from Mr. Jackson?

A. I think I did. I think I showed him that letter.

Q. You say they did call on you later for information and proof,—what was that?

A. Later Mr. Young asked me to give him a history of the entire transaction, and I looked through all our records, and, remembering everything I could, I wrote Young & Croxford a complete history of the transaction, insofar as I could find anything or remember it.

Q. Did they ask you for any information that required you to call upon Mr. Enders for anything after that?

A. Yes, they asked me to obtain from him a detailed account of his expenses, I think it was, in repairing the building, or making some repairs. Whether they had received a statement from Mr. Enders before and wanted me to confirm it or not, I don't know. I wrote to Mr. Enders and he sent me a statement, but it was written so badly and kind of scratched that I couldn't tell anything about it my-

self, and I sent it back to him and asked him to send me a statement I could read.

Q. Did you furnish them that statement?

A. Yes, sir.

Q. How long was that after the fire?

A. I think that was in the month of December.

Q. Now after August 19th, did you have any conversations with them?

A. Yes, a good many.

Q. Where were those—in Salt Lake?

A. Some of them were in Salt Lake and some in Ogden.

Q. Yes, and they were with reference to this loss?

A. Yes, sir.

Q. Will you state what those were?

MR. SHELTON: Conversations with whom?

MR. DAVIS: With Croxford or Young.

A. I had a conversation with Mr. Croxford. I went down to the office to see them, and Mr. Young was not there, and I found Mr. Croxford. I asked him how they were getting along with the settlement, and he said not very well, and he said Young made an unfortunate report to the companies, based on hearsay—

MR. SHELTON: If the Court please, I want to move to strike out the answer of the witness, and also to object upon the ground that it is incompetent, irrelevant, and immaterial, and connected with the amendment which they propose to present.

THE COURT: Sustained.

MR. DAVIS: Q. Did you have any other conversation with Croxford? Well, Mr. Shearman, was there anything else said at any of these times about this particular loss?

MR. DAVIS: I don't understand. Do I understand that the objections are sustained on the ground, because of what the adjusters say about a report?

THE COURT: Where is it covered by your pleading?

MR. JONES: It is covered in the second paragraph of the amendment.

THE COURT: On or about the 19th day of August?

MR. JONES: Yes.

THE COURT: He spoke about this as being later than that.

MR. JONES: Of course, on the 19th of August, and then goes on to say he furnished this report. After that report was furnished it is alleged that, pursuant to said request, the plaintiff, at considerable time and expense to himself, furnished the defendant with such statement, which was accepted and retained without objection from them, and that for many months thereafter the defendant, through its agents and adjusters, continued further negotiations looking to a settlement and adjustment of the loss caused by said fire, and during said time requested and obtained at expense to the plaintiff, written information and documents pertaining to

plaintiff's title to said property, and at no time indicated to plaintiff that payment of the said policy would be refused on account of failure to furnish written proof within a period of sixty days, etc. Under that allegation, that was not objected to, we take it we are entitled to go into the negotiations carried on between Mr. Enders or his agent Mr. Shearman, with the adjusters.

THE COURT: No, gentlemen. The condition should have been understood, that if you are going to amend at all you will have to state the time and place and person, where the conversations took place. I was exercising some discretion in your favor in permitting you to make an amendment of that kind, which refers to oral conversations, which are difficult to meet sometimes, and charges of that sort. Now I supposed you covered the ground as fully as you wanted to by stating when and where and what the conversation was, and with whom it was.

MR. JONES: If the Court please, the part that I read was allowed by stipulation of counsel, and the Court, of course, wouldn't object to our introducing this amendment if it was agreed upon by counsel. The only part we understood that the court exercised any discretion in the matter was the forepart of this, referring to that first conversation down at Salt Lake City with Mr. Young. The other part counsel for the defense conceded that we might make that amendment just the same as if it had

been originally pleaded. There was no objection to that. Your Honor will recall that they made no objection to the part we are raising here, but it was the fore-part.

THE COURT: Yes, but you don't charge in that second part any specific conversations.

MR. JONES: We charge that they carried on negotiations.

THE COURT: Well, you can have him testify that they carried on negotiations, if you want to, but we can't go into details as to what was said. I supposed the point of that paragraph was that they didn't make any objections.

MR. DAVIS: Q. How long did you continue to carry on negotiations with Croxford & Young?

A. Every little while.

Q. Up until when?

A. I think the last time I spoke to Mr. Croxford was in April of this year.

MR. SHELTON: Now, if the Court please, if Your Honor will permit me to make a statement in regard to this matter. The point of the amendment which they proposed to make was this, that prior to August 7th of this last year counsel stated in the original amendment that there were certain definite and specific conversations had between Mr. Young, of Croxford & Young, and the witness, or someone representing Mr. Enders, and that those conversations and statements presented a complete and definite waiver of the proof of loss within the

requisite time, and that later, on the 19th of August, a demand was made in writing by Croxford & Young for a proof of loss, and that they went to considerable trouble and expense in preparing that proof of loss, and that thereby the company was estopped from asserting that there had been any failure or breach of policy, the conditions of the policy, to furnish a proof of loss within the sixty days. That, as I understand, was the proposition which was presented. Now they propose, apparently, to ignore the specific requirements of the court, that they give a definite date and time and place to the conversations which occurred prior to the 7th of August, and then go on further after the 19th of August, when the letter was written requiring them definitely and specifically to furnish the proof of loss as required by the policy, and to continue a series of conversations over a period of something like six months, up to practically the time of the commencement of this suit. To that, if the Court please we most strenuously object, on the ground that they do not bring themselves within the terms and provisions of the amendment which has been allowed by the Court.

THE COURT: I think we have gone as far as I can permit you to go upon that point. I can't permit you to go into the nature of the negotiations, because you haven't pleaded the nature of them.

MR. DAVIS: Q. How many different times did they call on you for records, and for copies, etc?

MR. SHELTON: If the Court please, I think that ought to be confined strictly to the period specified in the amendment, prior to the filing of the proof of loss.

MR. JONES: If the Court please, I don't know but what Your Honor will be—Our Supreme Court has held that we don't need to even plead a waiver, that this is not a condition precedent at all.

THE COURT: You mean that the Supreme Court has held—

MR. JONES: Yes, Your Honor.

THE COURT: Wait a moment. You mean the Supreme Court has held that this provision in the policy is void?

MR. JONES: No. They hold that it is not a condition precedent. Yes, our Supreme Court—

THE COURT: What do you mean? I don't understand you.

MR. JONES: They hold that is not a condition precedent, and the policy isn't void merely because they fail—

THE COURT: What virtue do they give to this provision?

MR. JONES: They hold that there is no provision in these standard policies which voids the policy by reason of that fact.

THE COURT: It doesn't void the policy, but can you recover—

MR. JONES: Yes, it is clearly and squarely in point on that.

THE COURT: Then what is the purpose of the provision?

MR. JONES: Well, I think probably, like a great many—

THE COURT: What is the purpose of this provision?

MR. JONES: The purpose is to apprise, if the Court please, is to furnish the insurance company with notice and knowledge, and bring to their attention the character of the claim that is made against them.

THE COURT: But the Supreme Court holds you don't have to do that?

MR. JONES: Yes.

THE COURT: I doubt whether I would be inclined to follow that. I think this is a provision that the parties have agreed to, and ought to be binding. I hardly think any court has held that. I haven't seen the decision. I would be very glad to have you call that to my attention. You don't mean simply to say it may be waived? As I understand you, your contention is that it is void and the insured can ignore it entirely?

MR. JONES: They can ignore that entirely and make a *prima facie* case.

THE COURT: In other words, where there is a fire loss, without making any claim to the company at all, the insured may come in and sue upon it?

MR. JONES: Without making that proof of loss, yes, Your Honor.

THE COURT: Without making any claim?

MR. JONES: Yes, I take it, without even making any claim.

THE COURT: I would like to see the decision.

MR. JONES: But our further contention is that even if Your Honor didn't follow the Supreme Court in this state on that point, that the authorities, as we view it, are, that any negotiations or a series of negotiations that leads the insured to believe that they are treating and adjusting with him, are admissible for the purpose of going to the jury, for the purpose of determining whether or not they have waived that proposition, Your Honor. Or even a denial of the loss, a great many of the courts will hold, it waives the necessity of notice, or if they even plead it. And then there are other courts holding, and respectable courts, that if they accept a proof of loss after the time it is called for—

THE COURT: That would all seem to be aside from the point. Either this is material or it isn't.

MR. JONES: Yes, it is upon that point.

THE COURT: If it is material, I have held that you should have pleaded it.

MR. JONES: Yes, Your Honor. We have pleaded without objection that we carried on negotiations, documents and reports showing the treating on the part of the company, for the purpose of showing waiver, and we went to the trouble of furnishing these things.

THE COURT: If you can do that definitely, you

can do that, but you are asking about conversations or about generalities.

MR. DAVIS: I understand the ruling. I quit asking him about conversations. I am not endeavoring to do that now.

THE COURT: The last question was, how many times you had negotiations with them.

MR. DAVIS: I thought the last question was, how many times they asked for further proof.

Q. Calling your particular attention to it, you have stated that they called on you for additional statements as to his expenses. Did they call on you for any other copies that weren't in your possession?

THE COURT: Let me see. How did they call on you? If they called on you at all, how did they do it.

A. They asked me for it.

THE COURT: Who asked you for it?

A. Either Mr. Croxford or Mr. Young.

THE COURT: There is the difficulty. You stated that if I would permit you to amend you would make specific the time and place and person.

MR. DAVIS: The point is, Your Honor, we are not trying to prove this under the form of the amendment objected to. What I am trying to prove is that they asked him to furnish them a copy of the deed in escrow, and Enders went to the bank and sent a copy of the deed up to him, and he delivered it to him.

THE COURT: I suppose that would meet that, if that be the fact, if that is all you want to show. You can show that.

MR. DAVIS: Q. Tell me with reference to that.

A. They requested that, and I wrote to Enders to get a copy of the deed and a copy of the letter of instructions, and either send them to me—I don't know whether he sent them to me or to them; I think he sent them to me.

Q. And you furnished them to them?

A. Yes, sir.

Q. And those were copies of the letter from Mr. Heslet, and the deed introduced today?

A. I think he failed to send the copy of the letter of instructions.

Q. But he sent the copy of the deed?

A. Yes. I could refresh myself from the correspondence.

Q. Did they ask you for any other detailed information that you had to go out and procure, except asking you for these items he furnished with reference to his expenses, and asking for the deed, and asking you for permission, and going through your files and taking copies—did that cover what was done in that respect?

A. It is hard for me to remember without refreshing myself.

Q. You don't recall any other specific items?

A. No, I don't. There may have been, but I can't remember.

Q. But you do recall furnishing those. Now over what period of time would you say that you carried on negotiations with reference to this loss, with Messrs. Croxford & Young?

MR. SHELTON: If the Court please, that is immaterial.

THE COURT: Sustained. You may ask him when he did any one of these particular things, if you want to.

MR. DAVIS: Q. Do you recall about what time with reference to the date it was that they came to your office and inspected the files?

THE COURT: With respect to that time, what is it you want from the witness?

MR. DAVIS: I want to know if he can fix the time they came.

THE COURT: Very well.

A. You mean the time Mr. Egan came to my office?

Q. Yes, and went through your correspondence.

A. No, I can't.

Q. Can you tell approximately how long that was after the loss?

A. No, I can't. I was away most of the month of August, so that it must have occurred either in July or possibly September or October. I can't fix it definitely.

Q. Can you fix the time that you procured the copy of the deed for them from the Soda Springs Bank, through Enders?

A. I think I can by correspondence.

Q. Well, what was it?

A. Well, I would have to see the—

THE COURT: I think we will take a recess, gentlemen, until seven-thirty this evening.

An adjournment was thereupon taken until 7:30 p. m. of this date, Saturday, October 14, 1922.

7:30 P. M., Saturday, Oct. 14, 1922.

W. H. SHEARMAN, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION (Continued)

By MR. DAVIS:

Q. Can you tell me now, Mr. Shearman, when it was you delivered or sent them the copy of the deed?

A. Yes, sir.

Q. What was that?

A. I sent them the deed on November 9th.

Q. By letter?

A. Yes.

MR. DAVIS: Now I ask if you have in your possession the original letter sent to Croxford & Young by Mr. Shearman on November 9, 1921, which I asked for.

I ask to have this marked as a plaintiff's exhibit.

MR. SHELTON: Upon what basis, if the Court please, can a document of that kind be offered in evidence?

THE COURT: It isn't offered yet, is it?

MR. DAVIS: No.

Said paper was marked as

PLAINTIFF'S EXHIBIT NO. 24.

Q. In your negotiations with them you did reply to them by letter, in response to their request for information?

A. Yes, sir.

Q. Handing you Plaintiff's Exhibit No. 24, I will ask you if that is your original reply to them?

A. Yes.

MR. DAVIS: We now offer in evidence Plaintiff's Exhibit No. 24, being Mr. Shearman's reply and written report to them upon the deed requested, and upon other information requested by the adjusters.

MR. SHELTON: If the Court please, this is a letter from Mr. Shearman to Croxford & Young, in which Mr. Shearman details all of the information which he has attempted to recite here in court, most of which was hearsay, and rejected by the court for the reason that it was not founded upon his own knowledge, much of which came, as he said, from letters, and we object to it as incompetent, irrelevant, and immaterial.

THE COURT: What is the purpose of the offer?

MR. DAVIS: The purpose of it is, Your Honor, to show that he sent them the deed, and that he sent them information that they asked for, and that he kept dealing with them, and that this is a part of

their negotiations, and in reply to them, furnishing information that they wanted.

MR. SHELTON: It isn't binding in any way upon the defendant, a letter which has been written and which contains a lot of information which isn't founded upon any personal knowledge whatever, and it is in no way competent for this hearing.

THE COURT: The objection is sustained.

MR. DAVIS: Q. Now, Mr. Shearman, in your conversation with Mr. Young on the 29th day or about the 29th day of June, as you have fixed it, in their office, what was the last thing said between you or by Mr. Young to you with reference to this loss or furnishing proofs?

A. As I recollect it, I offered to furnish any proofs or documents that we had, or to do anything they wanted me to, to help settle the matter, and Mr. Young said he didn't want me to do anything then, that he would call upon me when he did want something.

MR. DAVIS: That is all.

CROSS EXAMINATION.

By MR. SHELTON:

Q. You went to see Mr. Young, as I understand you, relative to this loss?

A. Yes, sir.

Q. You told Mr. Young that you were interested in the loss?

A. I may have. I did at one time or another,

that is, not personally interested, but the Natural Mineral Water Co.

Q. You were interested in the loss in some way?

A. Well, yes.

Q. Did you at that time make any statement that you represented Enders in any respect?

A. Yes. I had heard from Mr. Enders—

Q. Did you state to Mr. Young that you represented Enders?

A. Yes, I told Mr. Young that I came down at Enders' request, he couldn't come.

Q. Now when was that conversation?

A. I can't fix the date, Judge, but my recollection is that Mr. Young told me that he had just come back from Soda Springs, possibly a few days; I don't remember the date.

Q. Was it in June?

A. I can't state positively.

Q. Was it in July?

A. I should think it must have been either the latter part of June or the early part of July, but I did nothing to fix the date.

Q. That is, you can't fix the date any nearer than that it was some time the latter part of June or some time in July?

A. Well, I could fix it better by saying it was soon after Mr. Young returned from Soda Springs whenever that was.

Q. You don't know when that was?

A. No.

Q. Now at that time you went down there for the purpose of seeing if there couldn't be some settlement of this loss?

A. I went down to find out about it, and what they were doing, and what had to be done, and if anybody had—

Q. And you told Mr. Young that you were willing to give him any information or assistance that you had?

A. Yes.

Q. That is, that the Kiesel Estate had?

A. Yes, anything that was in our files.

Q. And was that the extent of your offer at that time?

A. Just what do you mean by that?

Q. Was that the extent of the offer which you made at that time, to furnish him with any information that you had in your files?

A. Oh no. I think I told him I would do anything that he wanted me to do, to straighten the matter out, give any information I could or do anything.

Q. He told you there was nothing at that time?

A. Yes.

Q. Well now, is that the extent of that information which you were—that you offered to furnish him?

A. I think so. I couldn't offer to do anything more than—I could do everything that I could.

Q. He told you there wasn't anything he wanted at that time?

A. Yes, he didn't want me to do anything then. He said he would call on me later if—and he did do so.

Q. What further offer did you make before the 7th of August?

A. I don't remember.

Q. You didn't make any further offer?

A. No particular offer that I can remember.

Q. You didn't have any further conversation with him before the 7th of August, did you?

A. I am not certain. I went east about that time.

Q. How long were you gone east?

A. I was gone almost all the month of August.

Q. You didn't get back until September, did you?

A. I think I got back about the last of August.

Q. And that is all the conversation then that you had up to the time that you got back from the east?

A. I would not be certain, Judge. I may have talked with him again in July, but—

Q. You can't recollect?

A. I can't recollect. I think I was down at the office once or twice in July. I saw Mr. Buckholtz down there, C. W. Buckholtz. I don't recollect whether Mr. Young was there or not. If he was it slips my mind.

Q. Now you did furnish him with certain copies of letters, did you?

A. Yes, sir. Everything he wanted.

Q. Nothing was ever said to you in any way regarding proofs of loss, technically so-called?

A. How do you mean? No.

Q. Never mentioned in any way?

A. They never asked me for any.

Q. They were never mentioned, were they?

A. Not that I remember.

Q. Now referring to these letters, I call your attention to Defendant's Exhibit 21, which has been identified by Mr. Enders as a letter which he received from you, in which you say, "In accordance with Mr. Clark's suggestion I forward you herewith agreement in duplicate in connection with the sale to you of the Idanha Hotel. As soon as you have signed both the original and duplicate of the agreement, which please have witnessed, return them to me, and I will send them to Mr. Clark for his signature, and they will then be placed in the Soda Springs Bank. Your prompt attention to this will be appreciated. With very kind regards to you personally, I am, Yours very truly, Fred J. Kiesel Estate by W. H. Shearman." Now those agreements were agreements to embody the plan for the sale of this particular property, the Idanha Hotel, were they? A. No, sir.

Q. They were not?

A. The original sale had been made and the agreements—

Q. Just a minute now. Don't go into that.

A. Excuse me.

Q. These agreements were in relation to the sale of that property, were they not?

A. In relation to it, yes, sir.

Q. What?

A. Yes, sir.

Q. And you say they were made in accordance with Mr. Clark's suggestion, is that correct?

A. Well, yes; I suggested to Mr. Clark that it would be a good idea, and he approved of it.

Q. You suggested to Mr. Clark?

A. Yes.

Q. And he approved of it?

A. Yes.

Q. But it was his suggestion when you finally sent this letter to Mr. Enders, was it not?

A. Yes.

Q. Now those contracts were never executed by Mr. Enders?

A. Not to my knowledge. They were never returned to me.

Q. Never returned to you?

A. No, sir.

Q. And you have never seen them since?

A. No, sir.

Q. Later, did you receive any information in regard to this deed?

A. Subsequent, you mean, to that?

Q. Yes.

A. I don't quite understand.

Q. Well, did you ever have any further contract or agreement between Senator Clark or the Mineral Springs, or Natural Mineral Water Company?

A. No, nothing was ever done. The status remained as it was in the first place.

Q. Nothing was ever done after that?

A. The deed remained in the bank.

Q. The deed was in the bank?

A. And was not taken out.

Q. And has never been returned to you?

A. No, sir.

Q. Now another matter which is spoken of here. Did any of these letters, these three letters referred to,—and I may say that this letter marked Exhibit 20, dated October 26, 1920, addressed W. H. Shearman, Ogden, Utah. “My dear Friend: I received your letter and also contract in connection with the Idanha Hotel. The reason I haven’t answered is I wasn’t home. I shipped stock to Omaha and lost. Mr. Shearman times are awfully hard and I make good as soon as I can. I am on a deal and the man, Mr. Christensen, says it will be a month before he will have any money, so you will see that I am in need of time. Should he fail, I will place a mortgage so I can pay my bills.” Now that contract, or the contract that he mentions there, had reference to what?

A. That is the contract that I sent him in regard to the Idanha Hotel, at Mr. Clark’s suggestion.

Q. That is the contract which Senator Clark had suggested that you send him?

A. Yes, had agreed that I should send him.

Q. You are quite positive about that?

A. May I see the letter again?

Q. Certainly (handing same to witness).

A. Yes, that must be the contracts. I never sent him any other.

Q. Then there was no contract whatever—this was not a contract which referred to a loan of \$2800 by yourself to Mr. Enders?

A. No, sir.

MR. SHELTON: That is all.

MR. DAVIS: That is all.

MR. JONES: I will call Mr. Young.

LAWRENCE C. YOUNG, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JONES:

Q. You may state your name.

A. Lawrence C. Young.

Q. Are you a member of the firm of Croxford & Young?

A. Yes, sir.

Q. Are you the Young that has been referred to in this trial as being one of the adjusters?

A. Yes, sir.

Q. Did you go to Soda Springs after the fire that destroyed the Idanha Hotel?

A. Yes, sir.

Q. And inspect the premises?

A. Yes, sir.

Q. What date did you go?

A. I am not sure of the date.

Q. Have you any method by which you can refresh your recollection?

A. It was prior to the 9th day of July.

Q. What year?

A. 1921.

Q. Is that the nearest you can fix it?

A. I have nothing right at present to recall the exact date.

MR. JONES: That is all.

MR. SHELTON: That is all. I have no right to go into anything except what was inquired of on the direct.

MR. JONES: Call Mr. Davis.

UTHER J. DAVIS, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JONES:

Q. State your name.

A. Uther J. Davis.

Q. Where do you live, Mr. Davis?

A. Soda Springs.

Q. And how long have you lived there?

A. In the neighborhood of 25 years.

Q. What is your business?

A. I am a carpenter and contractor.

Q. How long have you been engaged in contracting and carpentering?

A. Oh, about 18 years.

Q. Are you familiar with what is known or what was known as the Idanha Hotel, prior to its destruction?

A. Yes, sir.

Q. How long had you known that hotel?

A. Ever since I moved to Soda Springs. That was in 1897.

Q. What opportunity have you had of observing both the interior and exterior of that hotel?

A. I have seen it every day nearly since I have been living there.

Q. Have you had occasion to be inside the hotel?

A. Yes, sir.

Q. How frequently and when?

A. What was the question?

Q. How frequently and when were you inside of it?

A. I have been in there several times. At one time my sister lived in part of it. That was while Mr. Enders had charge of it.

Q. Had an apartment in the hotel, your sister had an apartment there?

A. I say my sister lived there.

Q. In one of the apartments of the hotel, was it?

A. Yes, in what was called the dining room.

Q. How often did you visit the hotel during that time?

A. Probably every week or so.

Q. And when was that, that your sister was living there?

A. I believe three years ago; I am not certain as to the date.

Q. Did you ever do any figuring upon repairing the hotel?

A. Only the porches and the roof.

Q. Are you able to describe the character of that building, the general structure?

A. Why, yes, I believe so.

Q. Just briefly.

MR. JONES: I take it, if Your Honor please, that we have brought out that there was no actual market value of the building, and I take it the best proof obtainable is proof that will describe the property.

THE COURT: You may proceed until objection is made.

MR. JONES: Q. You may describe the property, Mr. Davis.

A. It was a frame building, I believe about sixty by ninety; I am not absolutely sure as to measurements, because I never measured it. And I judge that the wall plates were about 40 feet high.

MR. SHELTON: I object to this line of testimony, as incompetent and immaterial. It seems to me that the basis upon which they must rest is,

what is the actual cash value of this property at the time of the fire and the way to get at it is to ascertain what if they can be competent evidence is the actual cash value of the property at that time, when the fire occurred, and at that place.

MR. JONES: We agree with you that that is the test, but the method of arriving at the cash value is what we are getting at.

THE COURT: I think they may describe the building. That would be a circumstance anyway. It might be helpful to the jury in weighing conflicting expert testimony.

MR. JONES: You may proceed, Mr. Davis.

A. A frame building, finished outside with rust-ic, inside lath and plaster. I believe there were 42 bedrooms in it, if I remember the number of rooms correctly, and there was an annex on the east side, also frame, with a kitchen and store room, etc., below, and eight bedrooms above. The hotel contained four big fireplaces, brick work. It was plumbed, but not thoroughly. There was two floors, I believe, that had running water on them, the first and second floor. First class mill work throughout.

THE COURT: I can't hear you.

A. And I would say the building was in fair condition. I couldn't say that it was in absolutely first class condition, because it was an old building.

Q. Do you know when it was painted and tinted or repaired inside, with reference to the time of the fire?

A. No, I don't. I had nothing to do with it.

Q. Have you made an estimate, Mr. Davis, as to the amount and cost of labor and material that would be required to construct that building in June, 1921?

A. I have, to the best of my ability.

MR. SHELTON: I object to it. The question is not competent.

THE COURT: He says he has to the best of his ability.

MR. JONES: Q. Have you the figures upon which you made this rough estimate?

A. Yes, sir.

Q. With you?

A. Yes, sir.

Q. I wish you would state to the jury just what that estimate is.

A. Just the general—?

Q. Yes.

MR. SHELTON: Objected to, if the Court please, as incompetent and immaterial.

THE COURT: Objection sustained.

MR. JONES: Q. Do you know, Mr. Davis, whether the building had a market value at the time of its loss?

A. I couldn't say, I am sure. I didn't know that it was for sale.

Q. Do you know what the actual cash value of that building was at the time it was destroyed by fire, or have you an opinion as to what it was?

A. I could only give you an opinion.

Q. Well, I will ask you what in your opinion the cash value of that building was, outside of the foundation and the excavations below the foundation, taking into consideration its condition, at the time of the fire?

MR. SHELTON: I object, on the ground that he is not qualified to testify, and it is incompetent and immaterial.

THE COURT: Sustained.

MR. JONES: Q. Will you describe the roof of that building?

A. It was a four-hip roof, cut up in several dormers and gables, with a tin deck on top, and a large tower on one corner, a shingled roof for the most part, with the exception of that deck.

Q. Have you made a rough estimate of the amount of lumber that would be required to construct that building, not the value of it, but the amount?

A. Yes, I made a rough estimate.

Q. And are you able now to state what that rough estimate is?

MR. SHELTON: I object to that, if the Court please, as incompetent and immaterial.

THE COURT: Of what benefit would that be unless you go further than that?

MR. JONES: It would merely aid the jury in knowing what kind of a building it was and how much lumber was required. Of course, Your Honor

having shut us out—or taken the position that we can't show the other, it may be that this would be improper, under Your Honor's ruling.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 25

Q. Mr. Davis, do you know what the height of the ceilings on the lower floor were, in that building?

A. No, I don't think I am qualified to answer exactly.

Q. Can you approximate it?

A. Well, I believe they were 16-foot ceilings.

Q. Do you know what the height of the second story was?

A. Probably about 12.

Q. And the third?

A. The third floor, that varied, on account of these dormers. In the halls they were probably ten feet high. In the rooms they were cut up.

Q. Can you describe what kind of good work was used inside of the building, on the stairways and—

A. No, I couldn't say. It was first class finish, but I don't know what the wood was.

Q. Was it hard or soft wood?

A. I wouldn't say.

Q. Do you know what kind of lumber was used in the floors?

A. I think they were Oregon fir throughout.

Q. Oregon fir?

A. Yes.

Q. I show you, Mr. Davis, a paper identified as Plaintiff's Exhibit No. 25, and ask you to examine it and state whether or not that purports to represent a rough sketch of the ground floor of that building?

MR. SHELTON: I object to this, if the Court please, as incompetent and immaterial. I can't find that the witness has been qualified in any way. The evidence is immaterial.

THE COURT: I will let him show it if he knows about it. I understood the witness to say that he was merely approximating conditions here, that he never made any measurements.

MR. JONES: I take it this is the best evidence obtainable, because we have no sketch or any plans in existence.

THE COURT: Did this gentleman make this sketch?

MR. JONES: I understood he helped make it. Did you help make it?

A. Yes, sir.

Q. (By the Court) Where did you get your information?

A. From Mr. Enders and Mr. Falkenberg. I believe they measured it.

THE COURT: The objection will be sustained.

MR. JONES: You may take the witness.

MR. SHELTON: No cross examination.

MR. JONES: Call Mr. Falkenberg.

H. A. FALKENBERG, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. JONES:

Q. State your name?

A. H. A. Falkenberg.

Q. Where do you live, Mr. Falkenberg?

A. In Montpelier.

Q. Have you ever lived in Soda Springs?

A. Yes, sir.

Q. How long? How long did you live in Soda Springs, Mr. Falkenberg, approximately?

A. About four years.

Q. Were you acquainted with the Idanha Hotel?

A. Yes, sir.

A certain paper was marked

PLAINTIFF'S EXHIBIT NO. 26.

Q. I will ask you what your business is. What is your business?

A. Architect.

Q. And how long have you been an architect?

A. About 25 years.

Q. What has been your experience in the construction and figuring upon buildings, values, etc.?

A. I don't understand quite what you—

Q. Have you had considerable experience in contract work?

A. Not in construction work,—in architectural work.

Q. Have you prepared plans and supervised the construction of any buildings in Soda Springs?

A. Yes, sir.

Q. Any large ones?

A. Yes, sir.

Q. Which ones?

A. The court house, the new court house, and the new school house, the new Enders' Hotel, and several others.

Q. In Soda Springs?

A. Yes.

Q. Were you acquainted with the Idanha Hotel, yourself?

A. Yes, sir.

Q. Did you know it during the time you lived there?

A. Yes, sir.

Q. Had you ever been inside the hotel?

A. Yes, sir.

Q. Had you ever had any repairs done inside the hotel?

A. I didn't have it done. Mr. Enders had it done, but I had the overseeing of a part of it.

Q. You supervised the work?

A. Of a part of it, not all of it.

Q. What part of it?

A. Where we broke some openings through walls, where we didn't have any supports above it.

Q. I wish you would state to the jury just how those walls inside the building were constructed, of what material, size, etc.

A. The outside walls was—the outside and inside walls was of studdings. The outside walls was two by six and the inside studdings was two by four.

Q. And you say you have cut through some of those?

A. Yes.

Q. What was the condition of repair of those walls inside of the hotel?

MR. SHELTON: I object to this as immaterial, if the Court please.

THE COURT: What do you mean by the condition of repair of those walls?

MR. JONES: I mean the general condition as to whether they were in good or bad repair.

THE COURT: What was in good or bad repair?

MR. JONES: The interior partitions, the rooms and walls that he worked upon and was familiar with. He said he had cut through.

THE COURT: You cut through some openings, doors and windows?

A. Yes, connected rooms, etc.

THE COURT: What did you expect him to find when he cut through?

MR. JONES: What it was built of, first.

THE COURT: He has already stated that they were two by four studding inside.

WITNESS: Lathed and plastered.

MR. JONES: Q. What was the state of repair of the interior of that building, if you know it?

THE COURT: If he knows generally. I thought your question was confined to what he found in these openings.

MR. JONES: Oh, no. I asked him what the state of repair of the interior of the building was.

THE COURT: Very well. If he knows.

MR. JONES: If you know.

THE COURT: Fix the time.

MR. JONES: Q. When was it these repairs were made by you?

A. I don't know exactly; I didn't keep track of it; but I believe it was in 1918, something like that. It was in 1918, I believe, yes.

Q. Was it during the time that Mr. Enders had possession of the hotel?

A. Yes.

Q. Now do you know what the general state of repair of the interior of that building was during that time and up to 1921, when it was destroyed?

MR. SHELTON: I object to this, if the Court please. It is immaterial. It is not proper examination.

THE COURT: He stated that he did this work and knew of the condition in 1918. You may follow that up and see whether he knew anything about it later.

WITNESS: Well, in 1918 the material was absolutely sound.

MR. JONES: Q. Well, do you know what the condition of it was in 1919, 1920, and 1921, up to the time of the fire?

A. I don't know. I left before that.

Q. When did you leave?

A. I left about in the spring of 1920.

Q. Do you know what it was up to the time you left?

A. Well, it was in fair condition, the building, for the age it was in.

Q. I show you an exhibit marked Plaintiff's Exhibit 26, and ask you to state, if you know, what that is.

A. That is the Idanha Hotel.

Q. Do you know who took that picture?

A. Yes.

Q. Who?

A. I took it.

Q. When was that taken by you?

A. This was just taken a few weeks before I left there.

Q. In 1920?

A. Something like that, yes.

Q. In what direction, what view was that?

A. No; that was 1921; in the spring of 1921 I left, a year ago in the spring.

Q. You left just a short time before the fire, then?

A. Yes, about five or six months before, I believe.

Q. Is that a fair representation of that hotel at the time it was taken?

A. It is a photograph.

MR. JONES: We offer in evidence Plaintiff's Exhibit 26.

MR. SHELTON: I object to this, if the Court please, as incompetent and immaterial.

THE COURT: Overruled.

MR. JONES: Q. Do you know whether there was any market value for property of the kind of the—of the nature of the Idanha Hotel, in 1920, or 1921, at Soda Springs?

A. Beg pardon?

Q. Was there any market value for that kind of property at Soda Springs during either of those two years?

A. Yes, I believe there was a market value, but I don't know that, because I wasn't interested enough to find that out.

Q. Do you know of any other properties, hotels, being sold in there, near by?

A. The Stock Exchange Hotel was sold about that time.

Q. Where is the Stock Exchange from the Idanha Hotel?

A. It is located just about 200 yards east from the Idanha Hotel.

Q. On property contiguous to the—

A. Right adjoining.

Q. Do you know what—You stated you didn't know what the value of that—

A. No, I don't.

Q. Do you know what the actual cash value of that hotel was in 1921, at the time of its destruction?

MR. SHELTON: Objected to, if the Court please. The witness says he doesn't know, and I should think that would be sufficient.

THE COURT: Sustained.

MR. JONES: Q. Do you know what the building or the hotel adjoining this property brought?

MR. SHELTON: I object to that, if the Court please, as immaterial.

THE COURT: Sustained.

MR. JONES: Q. Why do you say there was a market value during that time?

A. Because it was sold.

Q. I mean market value for property like the Idanha.

MR. SHELTON: If the Court please, this is immaterial and incompetent. The reason why he said it had a market value isn't material, and he says he don't know what the value was.

THE COURT: I don't suppose he understands what you mean by market value.

WITNESS: Not exactly, no.

THE COURT: That is, if you mean that hotels were being bought and sold on the general market

there, the probability is that that is not the case, in a town of that size; I don't suppose hotels were being sold every day.

MR. JONES: It is apparent I think to the court by this time that there would be only one way of arriving at that, where it has no market value, would be to follow the general rule, and property of that kind wouldn't have, as a natural consequence, a market value, in a town of that size.

THE COURT: Oh, yes. Competent men might give an intelligent judgment as to what the property would sell for upon the market, and that would be its market value. In a community like this certain kinds of buildings might not be sold every day or every year, and yet men living in the community engaged in the business of buying and selling real estate, having to do with real estate values, might be able to give an intelligent judgment as to its value, what it would sell for.

MR. JONES: Q. Well, do you know, Mr. Falkenberg, from your knowledge of the building, its condition, its location, its use, its rental capacity, what the reasonable value of that building was at the time of the fire?

THE COURT: Just answer yes or no, whether you know. I understood the witness to answer that he didn't know.

A. I couldn't say right offhand. It would take a few minutes' study, to say what it would be worth.

MR. SHELTON: You can answer this question by yes or no, of course.

MR. JONES: Well, we will give you that opportunity, if you want a little time to study it. That is all.

THE COURT: Any cross examination?

MR. SHELTON: No, Your Honor.

THE COURT: That is all.

THEODORE ENDERS, heretofore duly sworn in his own behalf, upon being recalled, testified as follows:

DIRECT EXXAMINATION.

By MR. DAVIS:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expenses in operating it?

MR. SHELTON: Objected to, if the Court please, as not the basis of a proper measure of value for this hotel ,and I object to it as immaterial and irrelevant.

THE COURT: Well, if you will go into it for a long enough period, I think it would be competent.

MR. DAVIS: Very well. We will do that, Your Honor. We thought that the first year, under our view of it, was the most important one, under the authorities, but I will ask him all of the years. Just withdraw the question.

Q. Mr. Enders, what was the average monthly

income to you from the Enders Hotel for the period from about the first of February, 1918, up until the time it was destroyed, exclusive of the expense of operating it? Just tell me what it was, if you have computed that and know.

THE COURT: You said the Enders' Hotel.

WITNESS: You said the Enders' Hotel, and this is the Idanha Hotel.

Q. That is my mistake. I meant the Idanha Hotel.

A. I took a figure on it for three years, and the net income was \$220 a month.

Q. Of how much?

A. \$225 a month.

Q. Net income?

A. Yes, sir—220 a month.

Q. Two twenty?

A. Yes, two twenty. And five dollars I took for expenses.

A. \$220.

Q. \$220?

A. Yes.

Q. You don't need to tell me you take off \$5—that \$5 was your entire expense in operating the hotel?

A. You see we didn't have any expenses. The woman, I give her a room, and she tend to the other rooms what she rent out, and the other people they pay me so much for their "department" and they tend to their own rooms.

Q. And they tend to it themselves?

A. Yes, sir.

MR. DAVIS: That is all.

CROSS EXAMINATION.

By MR. SHELTON:

Q. There was no expense connected with it at all? How much did the laundry pay you? What was the rent the laundry paid you?

A. The laundry, they got their rent free for doing the laundry.

Q. That was five rooms?

A. Yes, sir.

Q. And the other roomers took care of them themselves, and everything was net in connection with that, was it?

A. Yes, pretty well, besides the—yes, I didn't pay them out anything. I had to give them a room for it, you know, but I didn't—

Q. How much did you allow for deterioration of that building each year?

A. Allow what?

Q. How much did you allow for deterioration, that is for the wear and tear of the building, each year, how much deduction?

A. I didn't allow any.

Q. You didn't allow anything. How much taxes did you pay?

A. About three hundred dollars.

Q. What?

A. About three hundred dollars.

Q. Three hundred dollars taxes?

A. Yes.

Q. How much interest did you allow on the value of the building?

A. \$240.

Q. That is, you estimated the value of the building at \$4000, and the interest on that would be \$240, at six per cent, would that be right?

A. Yes.

MR. SHELTON: That is all.

MR. DAVIS: That is all.

THE COURT: Q. What was your gross income a year, Mr. Enders? If you just take the money that was paid to you, how much did you get?

A. Everything?

Q. Yes. How much a year was your income from that building, putting aside entirely expenses?

A. Twelve times two hundred and thirty.

Q. In other words, your total gross income from the building would be at the rate of two hundred and thirty dollars a month?

A. Yes.

Q. And out of that you would have to pay all the expenses of the building, whatever they were, repairs and taxes and insurance?

A. Yes.

THE COURT: Very well.

MR. DAVIS: That is all.

MR. JONES: Call Mr. Jackson.

WM. H. JACKSON, Jr., produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. JONES:

Q. You may state your name.

A. William H. Jackson, Jr.

Q. What is your business, Mr. Jackson?

A. Real estate and insurance.

Q. How long have you been engaged in the real estate and insurance business?

A. Fourteen years.

Q. Are you the same Jackson that wrote the policies in question here?

A. Yes, sir.

Q. During that fourteen years have you bought and sold and heard of buildings and lands being bought and sold, considerably?

A. Yes, sir.

Q. Do you maintain a real estate office here in Pocatello?

A. Yes, sir.

Q. And as such real estate man do you have general knowledge of values of real estate in this vicinity and adjoining communities?

A. Yes, sir.

Q. And have general knowledge of the value of houses?

A. Yes, I think so.

Q. Is that based upon sales that you have made and sales that you have known to be made?

A. Yes, sir.

Q. Are you acquainted with the Idanha Hotel?

A. Not intimately. I know the hotel, I know the hotel, yes, sir.

Q. Did you ever live at Bancroft or have a branch office there?

A. Yes, sir.

Q. That is near Soda Springs, is it not?

A. Yes, 18 miles.

Q. At the time that you wrote these policies of insurance did you make inquiries to determine the value, approximate value of the Idanha property, hotel?

A. Yes, sir.

Q. And did you make these inquiries from people that were acquainted with the building?

A. Yes, sir.

Q. And from these inquiries and from your own knowledge of the building, did you fix in your mind a value upon that building, at that time?

A. Yes, sir.

Q. I will ask you, Mr. Jackson, from your experience as a real estate man covering a period of fourteen years, from your knowledge of the Idanha Hotel, from the information you received upon inquiries made to different parties as to the value and general condition of the Idanha Hotel, if you are

able to give an opinion as to the reasonable value of that property?

MR. SHELTON: If the Court please, that question is incompetent and immaterial.

THE COURT: Sustained.

MR. JONES: Q. Do you know whether that property had a market value, Mr. Jackson, at the time of the fire?

A. I am not sure that I would know what you mean by a market value.

Q. Well, a value that had been established by sales of similar property in the community.

A. Yes, I think it had a market value.

Q. And did you know, and do you know, what the market value of that property was at the time of the loss of the same by fire?

MR. SHELTON: If the Court please, the witness is not qualified to testify as to whether it had a market value or not.

THE COURT: Well now, by market value, Mr. Jackson,—you may not understand what we mean by that in court, but generally speaking we mean what the property would sell for.

WITNESS: I presume that is the case.

THE COURT: For cash, within a reasonable time, say a few months, by one who wanted to sell it and yet was under no compulsion, and to men who were able to buy and cared to buy it, but had no special need for it, there was no necessity upon them, in other words, what you, as a real estate

man, could have sold the property for in cash within a few months. Now you may answer the question as to whether you know what the property could have been sold for, what its market value was, with that explanation, that definition of market value.

A. I think I would have to say that I don't know whether it had a market value or not, under those conditions. If I might explain. The valuations that were given to me—

THE COURT: No.

MR. JONES: Did you understand the Court's explanation to you, that the market value was based upon what it would sell for, if there was a party who desired to buy and a party who desired to sell? Did you get that part of the explanation? Now, assuming that there was a party desirous of buying and a party desirous of selling, would you be able to say what the market value of that property would be?

THE COURT: Not a party desiring to buy, but the owner was willing to sell, but did not have to, and what it would sell for in the open market, where business men, investors, having money and desiring investment, but yet didn't have to invest in any particular property, again I put it to you, what you, as a real estate man, feel that you could sell that property for, for cash, under the conditions as they existed, within a few months, giving

a reasonable time in which to investigate and look around and try to find a buyer.

WITNESS: Now if I may ask for the substance of the question.

THE COURT: The question is now, whether you know what it could be sold for, for cash.

A. No, I don't.

MR. JONES: Q. Can you have an opinion upon that, as a real estate man, with knowledge?

MR. SHELTON: That isn't proper, if the Court please.

THE COURT: Well, of course it is an opinion, but it should be an intelligent opinion and an honest opinion. Suppose the owner would come to you as a real estate man, would you feel that you could intelligently advise him what you could get for that building, and not guess or conjecture merely, but could you give him an intelligent opinion as to what he ought to get for it, and what you could get for it?

A. Based only on my information as to its earning capacity. With that qualification, I could give an opinion.

THE COURT: Upon the assumption of its earning capacity any of us could make the same—if we had the same evidence, if the jurors had, they could make the same computation as you?

A. Yes.

THE COURT: You would simply capitalize its earning capacity?

A. Yes, sir.

MR. JONES: Q. Then you have no opinion and never had any opinion at the time you wrote this policy as to what that property was worth?

A. Yes, as to what it was worth, but I differentiate between that statement and market value.

Q. Well, then I take it the reason you do differentiate is because that property, there was no particular demand for that kind of property at that time?

A. Exactly.

Q. But you do have an opinion from all the facts and circumstances as to what that property was actually worth in cash, have you?

A. Yes, from the evidence that I acquired.

Q. Now what in your opinion was the actual cash value of that property in June, 1921, at the time of the fire?

MR. SHELTON: Objected to, if the Court please.

THE COURT: Sustained. He has stated that he would simply capitalize the earning capacity, as he was informed was the earning capacity. That is not competent evidence. Because we ought to have the earning capacity first hand, and then the jurors here would be just as competent to capitalize its earning capacity as the witness.

MR. JONES: Here is a man who has fixed a value upon it for his company, and he says—

THE COURT: I have ruled upon it.

MR. JONES: Yes. Well, that is all. We would like to offer, if Your Honor please—Now, the record shows that we are offering to prove this in the method we started, that is, by offering to show what the cost of reconstruction would be, and the difference between a reconstructed building and the building as it existed at the time of its destruction. That is the best method we would have of arriving at this. We can't get any better evidence of that fact. We would like to ask the Court if the Court will permit us to make that proof now in that form?

THE COURT: The offer is denied.

MR. DAVIS: Call Mr. Root.

DEL ROOT, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Your name is Del Root?

A. Yes, sir.

Q. Where do you live, Mr. Root?

A. Soda Springs.

Q. How long have you lived there?

A. Somewheres in the neighborhood of about 25 or 26 years.

Q. Were you familiar with the Idanha Hotel?

A. Yes, sir.

Q. What is your business?

A. Painter and paper hanger.

Q. Did you do any work in the Idanha Hotel?

A. Yes, sir.

Q. When was that done?

A. It was done about two years ago now, finished.

Q. That would be in October, 1920, before it burned the next spring. What was the extent of the work you did in the building?

A. Do you mean by the extent—

Q. What did you do?

A. Well, there was some of the rooms that were papered, some of them kalsomined, and all of them painted.

Q. How much did you receive for doing that work?

A. I couldn't tell you exactly, something a little over \$1500.

Q. Something over \$1500?

A. Yes, sir.

Q. What was the condition of the inside of the building with reference to being in good repair and in good condition at that time?

A. Good.

Q. It was good?

A. Yes, sir.

Q. Do you know what its condition was about the time it burned?

A. Yes, sir.

Q. What was it?

A. Good.

Q. It was good?

A. Yes.

Q. Do you have any information yourself as to market values in Soda Springs, that is, as a business man, are you familiar with the sale of properties there?

A. Yes, sir; I know the price that some properties have sold at.

Q. Yes. Would you say there was or was not a market value, a general cash market value for this property at the time it burned?

A. I would think so.

Q. Well, what would you say that was?

MR. SHELTON: Objected to, if the Court please. The witness is not qualified to testify as to the value of property, cash value, cash market value.

THE COURT: Sustained. I think you ought to qualify him further if he has any qualifications.

MR. DAVIS: If I have to qualify him as a real estate man, of course I can't do that, Your Honor, only just as he is familiar with the—

Q. Are you familiar with the price of buildings there?

A. Sir?

Q. Are you familiar with the prices that have been received for buildings in Soda Springs during the time you have lived there?

A. I know what the property adjoining that sold at.

Q. Was that a hotel property?

A. Yes, sir.

Q. How long before the destruction of this property was it that that property was sold?

A. I don't know exactly,—about a year perhaps.

Q. Do you know of any other hotels being sold in Soda Springs except the property that was sold adjoining it?

A. Not hotels, no.

Q. Do you know of business buildings being sold?

A. Yes, sir.

Q. Have you in a general way in the last three or four years, as a business man, kept yourself informed, and have you been informed, as to the market value of business buildings in Soda Springs?

A. Well, in a general way, yes.

Q. And you say you know of no other hotel except this one hotel being sold, within at least the last four or five years?

A. I do know of another hotel that was sold about a year before that.

Q. Do you know what that sold for?

A. Yes, sir.

Q. Now basing your answer upon your experience there and your statements as given here, can you give an opinion, an honest opinion of the fair market value of this property, in cash, at the time of its destruction?

A. I think so.

Q. What would that be?

MR. SHELTON: Objected to, if the Court please, as incompetent and irrelevant. The witness hasn't qualified to show that he is familiar or knows what the cash market value of the property was there, or is in any business that would indicate—

THE COURT: You haven't bought or sold any property there yourself?

A. Not myself, no, sir.

THE COURT: You are in the painting and kalsomining and papering business?

A. Yes, sir.

THE COURT: Do you own any property there yourself?

A. Yes, sir.

THE COURT: Anything other than your home?

A. Home and lots.

THE COURT: But you have never had any experience at all either owning or buying or selling business property?

A. No. I have had offers for my place, but I have never sold it.

THE COURT: That is, your home, you mean?

A. Yes, sir, and my lots.

THE COURT: Have you any information upon which you would be willing to act in buying this hotel?

A. I didn't understand you.

THE COURT: Have you any information with

regard to this hotel on which you would be willing to act in investing in it?

A. Providing it was standing today, you mean?

THE COURT: Yes.

A. Yes, sir.

THE COURT: That is, that you would be willing to buy it?

A. Yes, sir.

THE COURT: What is that information?

A. At the rate other property has sold at there, I would be willing to invest—

THE COURT: What is the information you have? Just what other property has sold for?

A. That would be my information; yes, sir.

THE COURT: You have never gone into the question as to what this property—what net rental could be gotten out of it in a year?

A. Yes, sir; I investigated that pretty thoroughly at one time.

THE COURT: When was that?

A. About two years ago.

THE COURT: What investigation was that?

A. I talked to Mr. Enders about leasing it, trying to rent it.

THE COURT: Did you find out what the gross income was?

A. I found out about what it was; yes, sir.

THE COURT: What did you find?

A. I found out at that time—

THE COURT: Did you just take his word, or did you make a thorough investigation of it?

A. No, sir; I inquired of people living there how much rent they were paying, and so on, and his word with it, yes, sir.

THE COURT: And how much a month was he getting at that time, gross?

A. Well, he was getting something, at that time, at the time I was inquiring, something a little better than \$240.

THE COURT: What is your tax rate there?

A. The tax rate is pretty high.

THE COURT: What is it, I say?

A. I think two eighty-seven.

THE COURT: Two eighty-seven?

A. I think so.

THE COURT: You mean the total tax rate?

A. Yes, sir.

THE COURT: I think we had all better move down there, gentlemen. Do you mean to say that in Soda Springs the total tax rate is two eighty-seven?

A. Maybe I misunderstood you.

THE COURT: How much a hundred, what is the levy, what is the total levy?

A. I couldn't tell you exactly right now. I have known just what the levy was by mills, but I couldn't tell you exactly now. I can tell you what taxes I pay on my property and what the assessed valuation is.

THE COURT: We can get at it that way.

A. All the taxes, city and everything?

THE COURT: Yes.

A. My assessed valuation is \$1035, and I think I paid three hundred and eighteen dollars and some cents taxes.

THE COURT: It sounds homelike, all right.

WITNESS: It sounds like moving.

MR. JONES: You must have a new sewer district down there.

WITNESS: That is including sewer and sidewalk and everything.

THE COURT: So that if this property was assessed at three thousand—

A. I don't know as his assessment would be that high.

THE COURT: You say a thousand dollars is your valuation?

A. \$1035.

THE COURT: And you pay three hundred dollars taxes?

A. Yes, sir.

THE COURT: What I am trying to get at, sir, is as to whether or not you have made an intelligent computation as to what one could afford to put in this property, assuming that it would be assessed at the proportion of valuation that the assessor usually puts on property, so that it would bear its share of taxes. Suppose it were valued at five thousand dollars—I mean suppose it were

worth five thousand dollars, and the assessor valued at at fifty per cent, that would be \$2500 valuation for tax purposes.

WITNESS: I don't think there is any rule that you could really go by on that.

THE COURT: No, but we are assuming that the assessor would come somewhere near assessing that as other property is assessed.

WITNESS: Yes, but I understood the taxes were about three hundred dollars on that property.

THE COURT: But you couldn't assume a continuation of that and be honest, could you?

A. We assume that our taxes will be lower than that in the next year or two, but we don't know.

THE COURT: I think I will sustain the objection so far as an opinion is concerned. If this gentleman can give us any information upon which we can exercise an intelligent judgment, you may have him give any information he has, but I don't think he is competent to express an opinion as an expert.

MR. DAVIS: I am afraid I can't ask him for any information without asking him for his opinion.

THE COURT: Gentlemen, you seem to have lost sight of the fundamental principle of an inquiry of this kind. Now, the Court wants just as good evidence as a private individual would want, an investor. The Court ought not to be asked to guess or to take mere conjectures, any more than an investor would. Now would a business man invest in property without having the exercise of some intel-

ligent judgment? If he were going to ask the opinion of an expert would he go to a man who is engaged in the business in which Mr. Root is, and with no more experience in the matter of real estate values than he has? Suppose a man were to go to Soda Springs with a view to investing in this property if he could get the property at a reasonable figure, would he go to a man like Mr. Root to ask him his opinion of the value? He might go to a real estate man there who is buying and selling property, as, for instance, if Mr. Jackson were there engaged in the same business that he is here in Pocatello, he might very well go to him and get an expression of opinion that would influence him more or less. But I can hardly conceive that an intelligent investor would seek the opinion of Mr. Root as to the value of this property. He might go to him and seek his opinion as to what it would cost to repair it, what the repairs were worth, because Mr. Root is apparently an expert on that, he could give him an intelligent opinion, an opinion that would be worth something. As I say, I don't think the Court ought to be asked to guess, any more than a private investor, and the Court is always seeking the best evidence. There are kinds of property so situated at times that courts must almost guess at the value, because there is no criterion, no intelligent opinion can be exercised, outside of court any more than in court, but here the property is situated in a settled community, where there are business

transactions relative to real estate, there are men doubtless engaged in the real estate business, men who could investigate this property and give us some assurance as to what the probable income would be from it, or what it could be sold for upon the market. But it would seem to me that the jurors here would be quite as able to exercise a judgment as to what this property could be sold for as could the witness, after he has given them the specific information that he has, and hence I say to you, you may get from him any specific information he has which will throw light upon the value. I have permitted you to describe the building, its nature and location, and put in a picture of it, and you have some information in as to the gross income from it, as to the tax rate, and all those things that have a bearing upon the value, and that a prudent investor would inquire about. But I hardly conceive that a prudent investor would go to a man in the business in which Mr. Root is, who has never bought or sold any property, has had nothing to do with that branch of business, and ask for his opinion, with any idea of acting upon it or being influenced by it.

MR. DAVIS: Q. Soda Springs is the county seat of Caribou County?

A. Yes, sir.

Q. What is the population there?

A. 965, I believe, at the last census.

Q. Is it a summer resort, in the popular term, as that is known?

A. It is known as that. ?

Q. Does it gain any business through the summer months by reason of its being a resort. Is there more business during the summer months in the hotel or rooming house business, because of that fact?

A. Yes, I think so.

Q. Did you have that in mind when you made your investigation?

A. Yes, sir.

Q. What did you take into consideration, Mr. Root, in examining the building and investigating it as to its potential earning power or income to be derived from it?

A. Why, I will tell you. I figured on trying to lease it from Mr. Enders and make a rooming house out of it.

Q. Did you think it could be put to better advantage as a rooming house than the use he was making of it?

A. I thought it could, through the summer months, yes, sir.

Q. If properly handled during those summer months, as a rooming house, what did you consider, from your investigation, it could be made to pay?

A. That I may pay for it, you say?

Q. No,—that it would pay, what it would reasonably pay, if properly operated, per month.

THE COURT: Have you ever been in the rooming house business?

A. In a small way.

THE COURT: I don't think that would be—his opinion as to what he might make it pay—he has had no experience in that line.

MR. DAVIS: Q. Well, what would you say its earning capacity was at that time?

A. I believe I stated that at the time I was talking with Mr. Enders—

Q. Yes, that is what he told you it was.

A. That is what I figured it out. That is, by asking the different tenants living in there the amount of rent they were paying, most of them; I didn't get to all of them. I took his word on part of it.

MR. DAVIS: That is all.

CROSS EXAMINATION.

By MR. SHELTON:

Q. Mr. Root, I may have misunderstood your name.

A. Root.

Q. You did the work of papering, painting and kalsomining the halls and rooms and wood work in the hotel?

A. I did most of it.

Q. Yes, and Mr. Enders paid you, as I understand it, \$1599.93?

A. Something about that, yes, sir; I don't remember exactly.

Q. In paying you that \$1599.93, was it all in cash?

A. No, sir.

Q. How was part of it paid?

A. Sir?

Q. How was it paid?

A. I had borrowed some money off of Mr. Enders some time before that, and he had my note, and that was turned on it.

Q. So it was turned on that note, and the balance in cash?

A. Yes, sir.

Q. How much cash?

A. Well, sir, I couldn't tell you exactly,—somewheres about five hundred dollars, I think, somewheres maybe a little more or less.

MR. SHELTON: That is all.

MR. DAVIS: That is all.

J. T. TORGESEN, a witness heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION.

By MR. JONES:

Q. State your name?

A. J. T. Torgesen.

Q. What is your business down there at Soda Springs?

A. Banker.

Q. How long have you been engaged in banking?

A. Four years.

Q. And what experience did you have or what was your business prior to that time?

A. Well, I have been a bank clerk, was a bank clerk in Ogden for four years before that.

Q. Since you have come to Soda Springs has your business as a banker required you to investigate and find out values upon property within Soda Springs and vicinity?

A. Yes, sir.

Q. And have you, as such banker, taken incumbrances upon property within the city of Soda Springs?

A. A few.

Q. And vicinity. Do you know what property in Soda Springs has changed hands during the time you have been there?

A. Yes. I could cite several pieces of property that have changed hands since I came there.

Q. Then you know what prices have been paid during the time you have been there for real estate containing buildings?

A. That is, I can't state prices in some cases, and then I heard of the prices in others, and I have reason to believe that the prices were as I was told.

Q. You know the Idanha Hotel?

A. Yes, sir.

Q. You knew it since you have been there?

A. Yes, sir.

Q. You have been inside of it?

A. Yes, sir.

Q. How often have you seen it?

A. Every day.

Q. Where is your bank located from the Idanha Hotel?

A. It was located just a block from the Idanha Hotel. We were in the same block. It was on the one corner and we was on the next corner south.

Q. Do you know whether there was any general market cash value for the Idanha Hotel at the time it was destroyed by fire?

A. Well, I hadn't heard of anybody wanting to buy it, but I know there was a general cash market value for property most anywhere in the city of Soda Springs.

Q. At that time?

A. Well, I wouldn't say right at that particular time, because we were right in the throes of a financial crisis, and there wasn't any property changing hands, but at the time Mr. Enders bought that property, property was changing hands in Soda Springs quite readily.

Q. Well, then you would say that in the kind of financial condition that was existing there, that there wasn't much property changing hands in Soda Springs at the time this property was destroyed?

A. Well, I don't know of any at that particular time in that community.

Q. Assuming that property was changing hands,

would you know what the general market value of property in Soda Springs would be?

A. Referring to that particular piece of property?

Q. Yes, or property generally?

A. Well, I would have an idea what it ought to be worth.

Q. I will ask you then if you know or have an opinion as to the general market value of the Idanha property in June, 1921. Answer that by yes or no.

A. You mean that I had an opinion?

Q. If you have an opinion?

A. Yes, I had an opinion.

Q. Do you still have the opinion as to what it was worth?

A. I still have the same opinion.

Q. You may state what in your opinion, from your experience as a banker, and your knowledge of conditions in Soda Springs, and transfers of real property, and the things you have enumerated, what the actual cash value, if you can, of the Idanha Hotel property was in 1921, at about the time of the fire.

MR. SHELTON: Objected to, if the Court please, as incompetent. The witness hasn't qualified to answer. He says there wasn't any actual cash value at that time, any market value.

THE COURT: Did you ever give any thought to the value of this particular property, sir, at that time?

A. I had given thought to the value of that particular property previous to the time that it was burned.

THE COURT: You say that property was selling more readily at the time Mr. Enders bought it than it was at the time it burned?

A. Well, I think so; from my recollection, property in 1918 and 1919 was selling more readily at Soda Springs than it was in 1921.

THE COURT: In other words upon the market it would have brought more in the same length of time in 1918 and 1919 than it would in 1921?

A. Yes, sir.

Q. What is your position in the bank?

A. Cashier of the Bank of Soda Springs.

THE COURT: Now you say you gave some thought. Did you make an investigation of the property, that is, its probable income, etc., at the time you mentioned?

A. Nothing only from observing the amounts of the deposits that Mr. Enders made there at the bank. We were handling his account. Of course I had no way of telling exactly what he was getting out of the Idanha Hotel, because he would deposit to one account the amount he received from the Idanha and the Enders hotels, but I always understood from Mr. Enders that he was getting from \$225 to \$275 a month. I never made any particular inquiries into it.

THE COURT: That is gross income?

A. That is gross income.

THE COURT: Did you ever make any inquiry as to what the ordinary and reasonable expense would be, if it were taxed at a fair valuation, considering its value, insured, and kept in repair, and charge for manager and various expenses that one would necessarily have to pay if he were investing in it? Did you ever give consideration to that?

A. I gave consideration to the question of—

THE COURT: I mean the expense as a whole. You wouldn't buy property on a rental proposition unless you made some careful computation as to the income and expenses, would you?

A. No, I wouldn't.

Q. Did you ever make any investigation so as to reach an intelligent conclusion in your own mind what it was worth? Did you ever make an investigation upon which you would be willing to invest anything in the property?

A. No, I never gave that a thought in that way.

THE COURT: And you weren't engaged in buying and selling real estate?

A. No, I wasn't. That wasn't my line of business.

THE COURT: I think I shall sustain the objection. You may, in this case, as you did in the others, get from this gentleman any information he has that would enable us to make some sort of computation or exercise an intelligent judgment as to this property.

MR. JONES: Q. You say you made some investigation prior to the time the hotel was destroyed, for the purpose of ascertaining its value?

A. Well, I questioned Mr. Enders about the income that he was receiving from it, because when I found out the price he was paying for it I thought he made a very good investment and I did go to the trouble of asking him about what it was netting him, and figured out that he had made a very good investment, at the price he was paying for the property.

Q. Did you find out what it was netting him?

A. Well, only from what he told me. I didn't make any investigation of my own, as I said. I didn't go and inquire from the tenants how much they were paying, neither did I go over and look into the hotel and see how many rooms were occupied.

Q. Was Soda Springs gradually growing from the time this property was bought up to the time it was destroyed?

A. I should say it was.

Q. Was there a greater demand in 1921 for rooms and hotel accommodations and apartments than there was at the time this property was bought in 1918?

A. Up to the time that the hotel was burned in the summer time there was a great demand for housing accommodations; in fact, it seems to me that the supply never did equal the demand.

Q. What would be the condition during the school months?

A. During the school months it was the same. The farmers would come in from the country to bring their children in to school, and they would take anything they could get, to get into a place where they could live for the winter.

Q. What would you say as to whether that building, if properly handled, at about the time it was destroyed, could have been filled to its capacity by renters, as housekeeping rooms, or for transients?

A. I firmly believe that it could have been filled to its capacity during the winter time for housekeeping rooms.

Q. And do you know what rental those rooms would bring, ordinarily?

A. Well, I would think that an apartment of housekeeping rooms, that is, two small rooms, ought to have brought anywhere from twelve to fifteen dollars a month; that would be my estimate.

Q. Do you know whether the people there were seeking that kind of a place, or housing accommodations of that kind?

A. They were seeking it, because they were living there, and it seemed like they were taking every apartment that they could get hold of, not only in the Idanha Hotel but in other places, like the old Wetzel building; and to my best recollection there was no vacant houses in the town, and people were asking almost every day, you might say, figurative-

ly speaking, for accommodations; they wanted to come in to the schools.

Q. Would that then, in your mind, govern you largely, if you were fixing the value to advise somebody as to what the value of that property was?

A. Yes, it would have a great deal of weight, I would think.

MR. JONES: Take the witness.

CROSS EXAMINATION.

My MR. SHELTON:

Q. Mr. Torgesen, how many inhabitants are there in Soda Springs?

A. Well, we have been saying there was around a thousand inhabitants.

Q. Has the number increased or decreased during the last two or three years?

A. Well, it has gradually increased to about that number. It has grown, I would say that Soda Springs has grown considerably in the last four or five years, judging from the number of new residences that have been built there.

Q. I understood you to say that at the time that Mr. Enders took this property, in your opinion it had a greater value than at the time that it burned?

A. Well—

Q. Did I misunderstand you, or did you make that statement?

A. I made that statement, with this modifica-

tion, owing to the general financial conditions, that it would suffer, of course, in the same proportion as other property in the town, or property in any community, under those conditions, general conditions.

If Mr. Enders was to pay, we will say, four thousand dollars for that property,—that was the amount which I understand you stated before, that he was to pay for it?

A. Well, I didn't know that he was to pay \$4000 at the time he took it over. I didn't know anything about the purchase price until 1920.

Q. You didn't know anything about what he was to pay for it?

A. I didn't know. I never heard him say what the purchase price was.

Q. But you considered that, whatever he was to pay, it was a bargain?

A. That was my opinion; it was a good buy.

Q. It was worth less at the time—

THE COURT: You have been over that two or three times.

MR. SHELTON: Yes, Your Honor; that is all.

MR. JONES: That is all. We had hoped that upon the authorities we had, that we had the right measure of damage in this case, and therefore all the witnessess we called were contractors, and the Court will readily see that in view of the position we are in now that we haven't called in real estate men. We called in contractors, people who knew

the values of buildings, and outside of that we are, of course, through. If the Court was going to continue on this evening to any great extent of course we would have to rest right now, but if the Court is not going to hear any more evidence other than what we have, we would prefer if the Court would allow us to have until Monday morning to call if we care to and if we can, some real estate men, who might know more about this property. We have exhausted such evidence as we have here on damages now, our witnesses.

THE COURT: Well, I will give you that opportunity. I want to speak to counsel a moment before adjourning. Gentlemen of the jury, you will be excused until Monday morning at nine-thirty. Remember the admonition I have given you heretofore, to avoid any outside influences. Nine-thirty Monday morning.

(The jury thereupon retired from the court room.)

THE COURT: Gentlemen, I assume from what you have stated that there will be no further evidence upon certain issues, and that the only evidence, if any, that you will now produce will be upon the question of the value of the building.

MR. JONES: Yes, Your Honor.

THE COURT: I would like to have you briefly, but directly, advise me upon one of the issues, at least, entirely apart from the question of value,—not this evening, because the hour is pretty late,

but be ready to do so Monday. It would seem now from the evidence that the most favorable view I can take of it to the plaintiff is that his interest in the property was that of a purchaser under an oral agreement, a purchaser having gone into possession under an oral agreement, with a deed in escrow. I say that is the most favorable view I can take. I don't know just what position counsel for the defendant will take in that respect, but it is quite clear that I couldn't take any more favorable view to the plaintiff. Now the question is as to whether or not, under those conditions and under the terms of the policy, you can recover. I would like to hear you upon that point Monday.

MR. JONES: We have a case here from the United States Supreme Court that we would like to leave with you.

THE COURT: Very well,—if you will just mark the book and leave it with me. Perhaps you can give counsel the reference now.

MR. DAVIS: It is the *Phenix Ins. Co. v. Kerr*, 129 Fed. 723. The next is the *Milwaukee Mechanics' Ins. Co. vs. Rhea & Son*, 123 Fed., page 9. And then we have a long list of cases here on that.

THE COURT: Is it listed on this?

MR. JONES: Yes, I think Your Honor will find it there.

THE COURT: I thought you said you had a Supreme Court decision on that.

MR. DAVIS: That is the case of—

THE COURT: If all your cases are upon your brief here, have you an extra copy of that?

MR. DAVIS: We had two copies was all, Your Honor. I will give counsel these cases here.

MR. JONES: We have some more also on that point that I didn't hand to Your Honor.

THE COURT: I think I misunderstood you. I supposed you had one controlling—of course, if there was a decision of the Supreme Court of the United States upon the point, it would be unnecessary to go further, but if you haven't, perhaps you would better exchange citations with counsel this evening, so that there will be no delay Monday in the argument, and each will know about what the other had upon that point, and you can present the argument to me more briefly. Of course, on this matter of waiver, I assume that I will hear from both sides. That is somewhat more indefinite. I was going to ask you whether you have any case from a federal court sustaining the view that you suggested today, that the Court should disregard this clause requiring sworn proofs or formal proofs.

MR. JONES: No, I don't think we have a federal case that the Court should disregard the proofs, but we have a number of federal cases that hold that where there is any evidence tending to show waiver the Court should submit it to the jury.

THE COURT: That is a different question. Of course, if this other view be taken, waiver is wholly unimportant, because the clause is without any value at all; it might as well be left out of the policy. I notice in the Supreme Court decision to which you refer, both in the brief, and in the citations given by Judge Rice, there are some federal cases on the one side but none cited on the other, and I was wondering if you found any on the other.

MR. JONES: We may be able to do so by Monday morning for Your Honor.

MR. SHELTON: If the Court please, I have a position which I wish to present to the Court, and I might just as well present it now as at any time, if Your Honor will listen to me a moment.

THE COURT: I must adjourn. It is rather late. You may state the proposition, if you care to, but I don't care to hear argument.

MR. SHELTON: My position is this, that a vendee or purchaser under an agreement to purchase is not the sole and unconditional owner of the property within the meaning of the policy, where he simply has an option to purchase and there is no binding, enforceable agreement on his part to take the property. The sole criterion and test in the matter, if the Court please, is, not whether the seller or vendor can be compelled to deliver the property upon the payment, or the deed, upon the payment of the purchase price, but whether there

is an absolute specific agreement which can be enforced in law or equity against the purchaser. In other words, when the property is destroyed, upon whom falls the loss? If the purchaser has become the actual owner of the property, so that he is obliged to pay the vendor for it, then he is the one that suffers the loss. On the other hand if he is not absolutely bound to make the payment, and if that cannot be enforced against him, then the vendor is the owner of the property and the only person that is entitled to insure as sole and unconditional owner, and on that I desire to call Your Honor's attention to two cases.

THE COURT: I don't care to hear the argument this evening.

MR. SHELTON: No, Your Honor, but I have a Supreme Court case which is directly upon that proposition.

THE COURT: Supreme Court of the United States?

MR. SHELTON: Supreme Court of the United States.

THE COURT: You may give me that citation.

MR. SHELTON: 106 United States, Richardson v. Hardwick, 106 U. S. 252, on page 254, and it is found in Vol. 27 of the Lawyers' Coop. Reports.

THE COURT: What other citation have you?

MR. SHELTON: The other one is a case cited by the gentlemen on the other side, Phenix Insur-

ance Company against Kerr, 129 Fed. 727.

THE COURT: The other side ought not to have any difficulty in finding that then.

MR. SHELTON: No. That is the case they cited, if Your Honor please.

THE COURT: Is there any difference between you on the legal proposition, Mr. Jones?

MR. JONES: No. If there was no—I think the general rule that this must be a mutual contract—we take it under the evidence here that Mr. Enders was actually bound to pay this money, and these people could collect from him, so that his case would not be in point under a fair construction of the evidence.

THE COURT: Let us see whether there is any difference. There seems to be no difference between you as to the legal proposition then. Mr. Jones, as I understand, concedes your proposition.

MR. SHELTON: Yes, I understand so.

MR. JONES: I don't exactly concede it. We have a Supreme Court case that is absolutely in point with us, a federal case that is absolutely in point with us.

THE COURT: You mean that if you merely have an option to purchase—

MR. JONES: I don't contend that we have an option; I contend that under this same state of facts the federal court has held—

THE COURT: Oh, it couldn't be the same state

of facts, because no two cases are alike.

MR. JONES: This was a case where creditors—

THE COURT: The only evidence upon this point would be that of Mr. Enders, as you have it now, is it not?

MR. JONES: Confirmed by Mr. Shearman, to the effect—

THE COURT: Yes, but I mean Mr. Enders' testimony would go as far as Mr. Shearman, and further, in detail anyway. Mr. Shearman's testimony would only tend to corroborate. Of course for the purposes of this motion I would have to assume that Mr. Enders' testimony is true, so that perhaps you would better direct my attention to the testimony on his part which discloses an obligation upon him to pay the \$4000, that is, an absolute obligation, as distinguished from a mere option. As I understand now, if the testimony is to be so construed, then there is no difference between you at all as to the law.

MR. JONES: Well, we contend it is more than an option, if Your Honor please, in this case.

THE COURT: Well, it must be either—there is no middle ground; it is merely a mere option or an obligation to pay.

MR. JONES: It is an obligation to pay.

THE COURT: It is either one thing or the other.

MR. JONES: Yes.

THE COURT: Nine-thirty Monday morning.

An adjournment was thereupon taken until 9:30 A. M., Monday, Oct. 16, 1922.

9:30 A. M., Monday, Oct. 16, 1922.

MR. DAVIS: May it please the Court, on Saturday evening Your Honor asked us and we told you that would be all except proof as to market value, by other parties. There are two letters that we think—

THE COURT: Do not show them to me. What is it you want?

MR. DAVIS: We want to know if the court will permit us to put that in.

THE COURT: Show them to counsel.

MR. SHELTON: We think they are entirely incompetent, irrelevant and immaterial, and object to them on that ground.

THE COURT: Well, I am sure it is immaterial. I think I will let them go in.

Certain papers were marked

PLAINTIFF'S EXHIBIT NO. 27 and 28.

MR. DAVIS: We offer in evidence Plaintiff's Exhibits 27 and 28, 27 being a letter from W. A. Clark, dated August 27, 1917.

MR. SHELTON: I object to it on the ground that it is incompetent, irrelevant, and immaterial.

THE COURT: Well, of course, if you object on the ground of competency—

MR. SHELTON: On competency, yes, Your Honor. I admit the signature of W. A. Clark.

THE COURT: The objection is overruled.

MR. DAVIS: We offer in evidence Plaintiff's Exhibit 28, being a letter from the British & Federal Underwriters to William H. Jackson, Jr.

THE COURT: That is, you admit the authenticity or genuineness of that signature?

MR. SHELTON: Oh, yes. And this I object to as immaterial and irrelevant, and entirely beside the issues in the case.

THE COURT: Overruled.

MR. DAVIS: I will read you Plaintiff's Exhibit No. 27.

PLAINTIFF'S EXHIBIT NO. 27.

"GENERAL OFFICE OF
WILLIAM A. CLARK,
BUTTE, MONTANA.
Mr. Fred J. Kiesel,

August 27th, 1917

Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st instant, to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price, will you kindly let me know what, if anything, was done. I, however, suggested to you that it would be better to take \$4,000 rather than miss the sale."

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

PLAINTIFF'S EXHIBIT NO. 28.

“BRITISH & FEDERAL FIRE

UNDERWRITERS OF LONDON AND NOR-
WICH, ENGLAND. PACIFIC
DEPARTMENT, 234 Sansome Street,
San Francisco, Cal.

San Francisco, Cal., Oct. 19, 1921.

Mr. William H. Jackson Jr.,

Agent,

Pocatello, Idaho.

CLAIM UNDER POLICY No. 54277, ENDERS.

Dear Sir:—

I have for acknowledgement your letter of the 14th inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of

our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,

JLF/S

Manager."

D. K. McLEAN, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. DAVIS:

Q. Your name is D. K. McLean?

A. Yes, sir.

Q. Where do you live?

A. Soda Springs, Idaho.

Q. How long have you lived there?

A. Seventeen years.

Q. What business are you engaged in at present?

A. Real estate.

Q. How long have you been engaged in the real estate business in Soda Springs?

A. Three years.

Q. What business were you engaged in in Soda Springs before you entered the real estate business?

A. Merchandising,—butcher.

Q. Were you familiar with the Idanha Hotel?

A. Yes, sir.

Q. Were you familiar with the building, as to its general condition on June 7, 1921?

A. Beg pardon?

Q. Were you familiar with the building, as to its general condition, at the time of the fire?

A. Yes.

Q. How long have you been familiar with it? I presume, of course, ever since you went to Soda Springs?

A. Yes, sir.

Q. Have you had occasion to be in the building?

A. Yes, sir.

Q. Do you recall about when the last occasion was of your being in the building?

A. Well, it was—if my memory serves me correctly, it would be some time in the spring of 1921, when there was a child died in there.

Q. That was the occasion of your being there?

A. Yes, sir.

Q. Did you at that time hold any official position, or have you ever held any official position in Caribou County?

A. Politically or religiously?

Q. No, — politically, as an officer there.

A. County commissioner.

Q. You were county commissioner how long?

A. Two years.

Q. And it was while you were county commissioner that you were over there, at this child's death?

A. No, I think it was just after the expiration

of my term.

Q. Before you went into the real estate business were you generally familiar with the prices and market values of property in Soda Springs?

A. Generally, yes, sir.

Q. Since you have been in the real estate business have you had business blocks or hotel buildings listed with you for sale, in Soda Springs?

A. Yes, sir.

Q. And do you know of sales of business buildings and of hotels being made in Soda Springs during that time?

A. Yes, sir.

Q. Are you familiar with the market value in Soda Springs of business properties there?

A. Yes, sir.

Q. Now I will ask you, Mr. McLean, basing your answer or your opinion upon your familiarity with conditions there, and upon your knowledge of the sale price, and upon the fact of hotels and other business buildings being listed with you, what would have been the fair reasonable cash market value of this property on the 7th day of June, 1921?

MR. SHELTON: Objected to, if the Court please, as incompetent, irrelevant, and immaterial, and the witness not qualified to testify, and upon the further ground, if the Court please, until they have established a title within the terms of the policy and within the terms of their complaint, all

this testimony is irrelevant.

THE COURT: I think I shall let him answer. You may have an exception. What was the cash value of the property on June 7th, at the time of the fire?

A. I would say \$15,000 would be a fair, conservative cash price of the property.

MR. DAVIS: Q. You would say that would be a very conservative estimate?

A. Yes, sir.

Q. How many real estate men are there in Soda Springs?

A. One besides myself, making two.

MR. DAVIS: That is all.

MR. SHELTON: That is all.

THE COURT: Q. After the fire what was the property worth, after the building had burned, what was it worth, what was its cash value?

A. It was totally destroyed.

Q. But what was the value of the site and what was left of the property? You say that of all the property was \$15,000.

A. I would rather be quoted as thinking my estimate would be that the building would be worth \$15,000.

Q. How do you get at that?

A. From the revenue.

Q. Oh, I assumed that you were giving an answer as to the value of the property.

MR. DAVIS: I didn't hear what he said, Your Honor, in answer to your question.

THE COURT: Read the answer to him.

(Answer read.)

THE COURT: And you say that you get your conclusion from the revenue?

A. That is what I would say, yes, from the revenue.

THE COURT: Q. Where did you get your knowledge of the revenue?

A. Not any knowledge I might have of the real revenue the building was bringing, but from what it ought to bring if it had been operated, and the number of rooms that I saw in the building, and what they could be used for.

Q. That is the only way you have gotten at the value you have given us?

A. Yes, sir.

THE COURT: I think his answer will be stricken out.

MR. DAVIS: Q. Mr. McLean, what I am trying to get at, is, if you had an honest opinion, and what you would say as a real estate man the market value of the property would be at that time, what you could reasonably expect to sell it for, and what you would expect to list it for, and to go to your clients or customers or friends with the reasonable expectation of selling the building for a cash price within a reasonable time, say two or three months, some-

thing like that. That is what I want you to testify to.

A. You then want an estimate as to the value of the corner with the building on, is that the idea?

Q. Yes, with the building on, of course.

THE COURT: No. In the first place, if you have any intelligent opinion in the matter, what could the property have been sold for, in cash, just as it stood before the fire, what could you give assurance, reasonable assurance, to the owner that you could sell that property for, for cash, within a reasonable time, say two or three months, as counsel suggested.

A. Well, I would say \$16,500, that the property as it now stands would be worth \$1500, the corner, the land.

MR. SHELTON: If the Court please, I move to strike out the answer of the witness, upon the ground that he hasn't shown himself competent to testify to the value of this property, the cash value of the property.

THE COURT: I think I will let it go to the jury. They may give it such weight as they think it is entitled to. You may cross-examine, if you desire.

CROSS EXAMINATION.

By MR. SHELTON:

Q. How long had that building been there?

A. I couldn't say. It was there when I went there?

Q. You don't know how old it was?

A. No, sir.

Q. How long have you been in that vicinity, so that you would know of this building?

A. Seventeen years.

Q. It was there when you came?

A. Yes, sir.

Q. A wooden building?

A. Yes, sir.

Q. As a real estate man, what is your estimate of the depreciation of a wooden building, percentage per year?

A. About ten per cent.

Q. About ten per cent per year, you think a building would depreciate ten per cent from its market value or from its cost value?

A. Yes.

Q. Then if this building was erected in 1887, you would say that it would depreciate ten per cent per annum from that time?

A. If it wasn't kept up, yes.

Q. Now what other property in that vicinity do you know of having been sold during the year 1921?

A. Well, I couldn't say as to the exact date of the selling of the Stock Exchange, but it was sold along either in 1920 or 1921.

Q. Some other property there?

A. Yes, right adjoining it.

Q. Now with regard to the land upon which this building stood, how large a lot was it?

A. Well, I should judge it would be about an acre and a quarter.

Q. How much in your estimate is that land worth?

A. \$1500.

Q. What?

A. \$1500.

A. Yes.

Q. Now how do you arrive at the estimate of \$15000 for the value of this property?

A. From the manner in which other properties are valued at around it, and the general condition of it then, the manner in which we are disposing of properties.

Q. Do you know of the fact that this property was offered for sale for a price approximating \$4000, for a long time prior to the fire?

A. No, sir.

Q. If that property was offered for sale for \$4000, would that make any difference in your estimate as to the \$15,000 value which you place upon it?

A. No, sir.

Q. When were you county commissioner there?

A. 1919 and 1920.

Q. Now, as a county commissioner of that coun-

ty, assuming that this property was only assessed at \$2500 for the land and building, when you state it was worth \$15,000, how was it that you, as county commissioner, didn't see that this property was assessed at its true value?

MR. DAVIS: Just a moment, if the Court please. We object to that as not proper cross examination, and not the proper measure of damages.

THE COURT: Overruled. Answer the question.

WITNESS: Please state the question again.

MR. SHELTON: Just read the question.

(Question read.)

A. An oversight, because we was figuring on assesing all those properties at fifty per cent.

Q. How is that?

A. The assessor was supposed to have assessed all those properties at fifty per cent of the cash value.

Q. That was the basis upon which it was made?

A. Yes, sir.

Q. But here was a piece of property which you say was worth \$15,000, which was only assessed at \$2500?

A. Well, that was no fault of mine.

MR. SHELTON: That is all.

MR. DAVIS: That is all.

THE COURT: Q. You say it wasn't a fault of yours?

A. No, sir.

Q. Why?

A. Well, I didn't assess it.

Q. It was your duty as commissioner to see that it was valued properly, wasn't it?

A. In going over the property, it was, yes, sir.

Q. How long have you been in the real estate business?

A. Three years.

Q. Would it make any difference in your judgment of the value of this property if you knew it sold on the open market within that time for \$4000?

A. No, sir.

THE COURT: That is all.

MR. DAVIS: If the Court please, there are only two real estate men in Soda Springs, and I just want to say for the court and counsel's information and of course we can prove it, Mr. Enders immediately called the other man, Stanley Matthews—

THE COURT: That is unnecessary, to go into that. Have you any more testimony to put on?

MR. JONES: We did ask Mr. Weeter to be here, but we thought the court adjourned until ten, and we will have to go without Mr. Weeter's testimony. He isn't here. We rest.

MR. SHELTON: I would like to make a motion at this time, if the Court please.

THE COURT: Gentlemen of the Jury, you may retire from the courtroom temporarily. I will send

for you when—

(The jury thereupon retired from the court room.)

MR. SHELTON: Now comes the above named defendant, and moves the court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was only the owner of an option to purchase.

a. The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000, and he has never paid that sum, or any part thereof.

b. The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount; hence the loss necessarily falls on the owner of the property, to-wit, the Natural Mineral Water Company.

c. The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

d. The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is

not authorized by any vote of the board of directors, and is without seal, and is without validity.

e. It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he furnished the proof of loss required by the terms of the policy, within the sixty days specified, and failure so to do precludes his recovery. The waiver of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or if the interest of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the

Kiesel Estate had no mortgage or lien upon the interest or interest in the property whatever. He stated the same thing in his complaint, and thereby the policy became void by express condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of the insurance be a building on ground not owned by the insured in fee simple." The subject of the insurance as specified is as follows: "On the three-story shingle roof frame building, and its additions, if any, of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only which occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon street, between Hooper and Railroad streets, in Soda Springs, Idaho."

The plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and

thereby the terms of the policy were invalidated and the insurance ceased.

Th first point which I desire to call to the attention of the court is this, that in accordance with the decision in the cass of Phoenix Insurance Co., against Kerr, in the 129 Federal, the proposition is laid down distinctly that in order to maintain the proposition that a man is the sole and unconditional owner of a piece of property, where he claims an executory contract of sale, there must be a binding agreement on his part which can be enforced to pay absolutely for the property. He may have an agreement that he can enforce himself against the owner of the property, that is ,he can compel the owner to make a deed to him upon his payment of the purchase price, but unless the owner can compel him to pay the purchase price, unless he had bound himself by a specific agreement to pay the purchase price, then, according to that decision and to the line of authorities which it cites, he is not the sole and unconditional owner of the property, but only of an option to purchase. And that point, if the Court please, is specifically reported and upheld in the case in the 106 U. S., the Hardwick case—I think that is the name of the case, Richardson against Hardwick, 106 U. S. 252, 254, in which they draw that distinction. The distinction is that a person who has an option on property is not the owner of the property, but only the owner of the option.

Now, if the Court please, upon that point alone the plaintiff has utterly failed to show that he is the sole and unconditional owner of the property, because there isn't a scintilla of evidence in this case from the beginning to the end of it, in which it is shown directly or inferentially that Enders is bound to pay the \$4000 purchase price, if a purchase price was agreed upon that can be enforced against him. He states upon the stand that he had an option to purchase. He states that he paid the interest upon this \$4000, but, if the Court please, the only effect of the payment of the interest, if it was paid to the Natural Mineral Water Company, is that he could compel the Natural Mineral Water Company, perhaps by reason of the acceptance of that interest, to convey to him when he paid the \$4000; but there is not anywhere any evidence in this record that he agreed, bound himself in any manner to pay that money whether the building was destroyed or not. Now, if the Court please, I don't want to take up too much time in going over this matter to the court, because the matter is clear to me that there is absolutely in this case no basis upon which the plaintiff can recover.

Now going along a little further in this connection and taking up this very contract which he proposes as the basis of his recovery. A deed is offered in evidence which has never been delivered. The basis upon which this deed was sent is in a let-

ter addressed to him by Heslet, in which Heslet says: "We are in receipt of a deed from the Natural Mineral Water Company, conveying to you the north half of lot 4, and all of lot 5, in block 38, Soda Springs, Caribou County, Idaho, to be delivered to you on payment of \$4000. On receipt of the above amount we will forward the deed to you."

And in his letter to the bank of Soda Springs he says: "Enclosed I hand you herewith deed from the Natural Mineral Water Company to Theo. Enders, for inspection of Mr. Enders' attorney. After Mr. Enders and his attorney have inspected the deed, kindly return the same to us, with a statement of your charges in the matter, and greatly oblige."

Now, if the Court please, that covers the entire documentary evidence with regard to that deed. When Mr. Enders saw Mr. Clark at Soda Springs he stated in so many words that he wished Mr. Clark would leave the deed there in the bank, and Clark said it was all right with him, he guessed.

Now taking up the next question, as to the vague talk. He stated that he had some talk with Mr. Clark, and that he would like to have the terms—this is Enders' statement—the same as he had talked with Mr. Kiesel. And he says Mr. Clark told him that that was all right. He states that Kiesel had told him he could have six years within which to pay for that property. Now, if the Court please, the terms of a contract for the payment for a piece

of property cannot be of that indefinite character consisting of vague talks between men interested in a corporation. There was no promise ever, there was no agreement ever testified to or claimed on the part of Enders that he himself had bound himself irrevocably in any manner so that it could be enforced in law, to the payment of that \$4000, or any other sum. And in the absence of specific and binding terms of a contract, there is no sole and unconditional ownership under the terms of this policy and within the meaning of the law. In fact, if the Court please, we have nothing here to indicate what the Natural Mineral Water Company is. It is assumed to be a corporation. A corporation acts under a seal. It acts through its board of directors. It acts always through a direct authorization from its board of directors, and in some instances it requires the vote of the stockholders to carry out that very proposition. But assuming that there was a corporation in existence with power to act, there is no authorization here whatever, and nothing to indicate that there has ever been, under any circumstances whatever, a binding agreement upon the part of the Natural Mineral Water Company to convey this property, or a binding agreement or any agreement, or anything that can be enforced against Enders. If the Natural Mineral Water Company today came into court and asked the court for a judgment against Theodore Enders upon that

\$4000, saying that he had agreed to pay that \$4000 to the Natural Mineral Water Company for that piece of property, is there a single thing before this court, from the testimony from the beginning to the end, that would warrant this court in saying that any such agreement existed or that he was bound by it in any way; and if he says, "I do not owe that money, I never agreed, I had an option," as he said on the witness stand, "I had an option to purchase, and it was simply a unilateral option, binding them to convey when I paid, but not binding me to pay at all," is there anything in this testimony from beginning to end that would warrant the court in saying that he ever at any time was bound?

Now, if the Court please, going on a little further, in connection with this matter. Under the terms of the policy there are two provisions which I desire to call to your honor's attention, and that is this. In the complaint the plaintiff sets forth in paragraph two that the plaintiff at all times herein mentioned, as the vendee of an executory contract entered into by the plaintiff and the Natural Mineral Water Company, a corporation, for the purchase of lot five and the north half of lot four in block thirty-eight in the village of Soda Springs, Caribou County, State of Idaho, together with the appurtenances thereon, had an insurable interest in a three story, frame building, and the contents thereof, erected and situate on the premises last

described, and known as the Idanha Hotel at the time of its insurance and destruction by fire, as hereinafter mentioned."

In the policy of insurance is this clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein."

Then further: "Or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

Now, if the Court please, in that particular instance, under the authorities of the federal courts, if a man asks to have property insured he is bound to disclose fully and completely the status of his title. If he does not disclose that title, then it is assumed that his ownerships of the property is absolute, sole, and unconditional. And if it is a building, if the Court please, upon ground not owned by him in fee simple, then the policy, if the Court please, is absolutely void. Now in his complaint he sets forth specifically that he has an insurable interest in this property, in the building; it is the building that he has insured. And he says by the terms of the policy, the fact that it was accepted and delivered to him, and the authorities are uncon-

tradicted upon that point, if the Court please, if that building is upon ground not owned by him in fee simple, then the policy is void. And by the very terms of his complaint, in the very allegations of that complaint, he puts himself out of court, because he pleads there that he did not own the ground in fee simple, but had, as he said, only an executory interest therein. If the Court please, the authorities upon that point are clear and specific and without any question. I wish to cite one case which I found in an examination of the authorities. I will read the head note. It is a Michigan case. "A person in possession of land under a deed deposited with a third person, to be delivered on performance of a condition, is not the owner of land in fee simple." That is the case of Hindman against Insurance Company, 62 Mich. 638, and cited in the 29th N. W., 475. If the Court please, upon those two propositions we maintain that the plaintiff here absolutely has failed to show that he was the sole and unconditional owner of this property within the meaning of the authorities, that he is not the owner in fee simple of this title, it is clear and specific, and that by the very terms of his complaint he has no right of recovery in this action.

Now, if the Court please, another proposition which I desire to present to Your Honor briefly is this: By the terms of the policy, and I wish to say, if the Court please, in this connection, that in the

United States courts throughout, not only in the lower courts, but in the Supreme Court of the United States, there has been a uniformity of decision always, that an insurance policy is a contract entered into, which stands as it is written, that it is not, if the Court please, for the parties to change or waive that policy, unless it is done in the regular form, and that is in the manner prescribed by the terms of the policy. Nor, if the Court please, in this particular policy we find this: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." Now in that particular instance we have this: He stated, and the policy was written payable to the Kiesel Estate, mortgagee. In his proof of loss, or in the affidavit which he furnished, is this clause: "That the interest affiant had in said property is, he was the owner of said building and the land on which the same stood, by purchase thereof under contract and escrow agreement from the Kiesel Estate and Ex-Senator Clark, and was the sole and absolute owner of the furniture and property contained therein; that the Kiesel Estate

has and holds an interest in said property as security in the sum of \$5400." Now that affidavit was made, and has been introduced in evidence by the plaintiff himself, and in that he states, not that he purchased this property or had a contract to purchase this property from Natural Mineral Water Company, but that he purchased this property from the Kiesel Estate and Ex-Senator W. A. Clark. Now under those circumstances, if the Court please, we maintain, and the authority of the Supreme Court of the United States is, that where a man makes an affidavit after a loss, and I am quoting or citing a case in the 22 Wallace, the statements which he made in that proof of loss are binding upon him. Some authorities go to the extent of holding that they are absolutely conclusive upon him, and that he cannot be heard to question it at all. But there he says, not that he purchased this property from the Natural Mineral Water Company,—that is a later proposition,—but that he purchased it from the Kiesel Estate and from W. A. Clark, who had no interest or ownership therein. And he says there further that he owed the Kiesel Estate, and that the Kiesel estate had a mortgage or security upon that property in the sum of \$5400. And that is absolutely untrue, as he says himself it is untrue, and yet in his proof of loss he makes that statement under oath, and it is a false statement, a false oath, if the Court please, and by the

very terms thereof he has abandoned his rights to recover under this policy.

Now, if the Court please, another proposition: In this same policy is this provision: "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery de-

stroyed or damaged," etc.

If the Court please, it has been held by the federal authorities, and there is no question upon that proposition, it is the established rule in the United States courts, that the proof of loss, the furnishing of the proof of loss in accordance with the terms of the policy, within sixty days, after the fire, is a condition precedent to the right of the plaintiff to maintain a suit. That is the rule in the federal courts, and I have cited two decisions, if the Court please, upon that. One is the case of *San Francisco Savings Union v. Western Assurance Co.*, of Toronto, 157 Fed. 695. The other is *American Cereal Co. v. Western Assurance Co.*, 148 Fed. 77. And a third is the *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452.

Now, if the Court please, that is a proposition which there has never been any question about in the federal courts, and the plaintiff is in duty bound to show conclusively that he furnished that proof of loss within the time specified, or he has no right to maintain the suit. The waiver which he attempted to plead is absolutely no waiver. The only evidence upon that point is the evidence of the witness Shearman, who testifies that Enders came to him and asked him to see the adjuster, that he saw Young, of the firm of Croxford & Young, and told them that anything that the Kiesel estate had in the way of information he would be glad to provide it, and

nothing was said about proof of loss; nothing was said about the requirements of the policy as to the necessity of the proof of loss, according to the terms, and the absolute fact is that there wasn't any evidence here which showed even the slightest tendency towards a waiver upon that proposition. And Shearman says that after that interview which he had he was absent until along in September. One of the points which I desire to present to the court upon that proposition is this, that that proof of loss was never waived. The requirement of it was never waived, and there was never any estoppel or claim on the part of the plaintiff that he had been compelled to do or was compelled to do more than the actual terms of the policy required, and no man can plead an estoppel when by the very terms of the policy he is required to present those proofs in the manner and form specified by the terms of the policy, and unless he does so he absolutely precludes himself from the right of recovery, and of course they attempted, in saying there was a waiver, to show that there was a waiver before the 7th of August, or before the sixty days expired, but nothing of that kind has been shown or attempted to be shown, if the Court please, and unless there was a waiver before the sixty days expired specifically, why then all proceedings further are nothing, because you can't cure a breach by subsequent acts, and that the authorities sustain.

Now, if the Court please, there is one other point which I mentioned in my motion, and that is, that it is absolutely essential that the building itself should be used for the purposes that are specified, and those only, namely, hotel and apartment house. A commercial laundry was in that building, and so long as that commercial laundry was there it was a violation of a specific warranty, and violated the policy. The authorities which I have, if the Court please, sustain these propositions. The federal authorities are clear and specific.

There is one other point which I didn't mention, and that is that in this particular policy is this clause,—and this has been upheld and sustained continually by the United States courts throughout, and that is this: "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions, as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deem

ed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The agreement is specific. It absolutely precludes the right of any one representing the company to in any manner, by act or deed, to waive any of the terms of that policy, unless done specifically according to the provisions thereof, and when this notice was given to him to comply with the terms of the policy there was quoted to him the very clause which I have referred to, in regard to the proof of loss. The proof of loss which was presented was in pursuance of that demand, but he did not show that there had been an extension or a waiver within the very terms of that demand, and therefore when the demand, if the Court please, is specific, requiring him to live up to the terms of his policy, it is no waiver or estoppel. We submit, if the Court please, that there is nothing in this case under the evidence to go to the jury.

THE COURT: What have you to say, gentlemen, upon that provision in the policy that the policy shall be void unless the insured has title in fee simple to the property?

MR. JONES: I think we could save time, Your Honor, by reading a short case from the Circuit Court of Appeals of the United States, that bears

upon this question, and is so similar to the case in question, only more extreme, that I think the mere reading of this decision to Your Honor—I think we can save time,—if Your Honor has not read it—it is the case *Mechanics'*—

THE COURT: Let me see it.

MR. JONES: (Handing case to judge) And that case, I might say, is approved in a later case, and a case cited by counsel for defendants.

THE COURT: That is on the general proposition about ownership, but have you any case upon the provision as to having title in fee simple?

MR. JONES: Yes, Your Honor. We have three cases here, a synopsis of which is given in the brief we handed to Your Honor. I shall read to you.

THE COURT: Gentlemen, it must be confessed that some of these questions which have been presented are not free from very grave doubt, but I don't think that I shall take the time presently to give full consideration to them, and shall overrule the motion. If I err, the matter can be brought to my attention in a motion for a new trial. It certainly is a very unusual situation in many of its aspects. I think I will let the matter go to the jury. The motion will be denied.

Have the jury come in. I will say to counsel for the defendant that I shall be very glad to have your requests for instructions upon some of these points, if you have them prepared.

MR. SHELTON: Well, if the Court please, I haven't my instructions prepared. Before the federal court in Montana I have made just brief requests in accordance with my motion, that is, the court in Montana always instructs the jury orally.

THE COURT: Very well.

MR. SHELTON: The only witness we have, if the Court please, is one on the value of the property, and then we will submit the case to the jury.

THE COURT: May I see counsel a moment at the desk—both sides?

(Conference between court and counsel.)

THE COURT: Proceed, gentlemen.

MR. SHELTON: If the Court please, we rest. And I now desire to move the court to instruct the jury to find a verdict for the defendant, upon the grounds embodied and specified in my motion for a nonsuit, which I argued.

THE COURT: Very well. The motion is denied.

MR. SHELTON: And the requests for instructions, it being denied, of course, are embodied in my motion, except as to the value. That, if the Court please, I presume will be submitted to the jury under proper instructions.

THE COURT: You may address the jury.

(Argument to the jury by counsel.)

THE COURT: Gentlemen of the jury, as you have been advised, there are four different suits

brought by the plaintiff here upon four distinct insurance policies, with four different insurance companies, but the property covered by the policies was all the same property, and all of the policies are of the standard form, and hence are all substantially the same, and with the exception of the name of the insurer the four policies are substantially identical, and inasmuch as it was but a single loss, that is, the burning of the property covered by each of the four policies, the suits have been consolidated for trial, and yet it will be necessary to find a verdict in each one of the four cases. Hence a form of verdict will be handed to you, or two forms, rather, in each case, one enabling you to find for the defendant and the other enabling you to express your finding in favor of the plaintiff, with a blank left for the insertion of the amount; that is, in each case if you should find for the defendant insurance company you will use the verdict which has no blank in it, that is, simply in favor of the defendant; if you find in favor of the plaintiff you will use the other form, and you will insert the amount that you find to be due the plaintiff. Inasmuch as such is the relation of the four policies, if you get to the question of the plaintiff's loss, in other words, if you award anything to him, you would divide the total amount which you award him by four, and find one-fourth of such total amount against each one of the insurance companies. They are all to be put upon the same foot-

ing and are to share pro rata such loss, if any, as you find the plaintiff is entitled to recover for.

As you have been further advised, the amount of the insurance upon the building in each case is \$3,000, making an aggregate of \$12,000 for the four policies. And so the amount of the insurance upon the personal property or the contents of the building in each case was \$1,000, making an aggregate insurance upon the contents or personal property of \$4,000. Now, as I have already explained to you, each of the policies runs in favor of the plaintiff here, Theodore Enders, and there is no question of the execution and delivery of the policies. We call such a contract an insurance policy, but essentially it is a contract, a contract of a special kind, and yet, generally speaking, the same principles and rules which we apply to ordinary contracts of various kinds are applicable to insurance contracts, called insurance policies. There are some distinctive features, but you must bear in mind that a policy is a contract or an agreement between the owner of property and an insurance company. Its conditions are to be regarded as binding, and each party is bound to carry out the obligations placed upon him by the agreement, just the same as in the case of other contracts or agreements, subject to certain exceptions, to which I will call your attention, such exceptions, however, being applicable to other contracts as well.

Now in taking out insurance the owner of property must act in good faith, and must not misrepresent the facts or deceive the insurance company. The company is entitled to know about the property, and may make inquiries, and is entitled, when it calls for it, to have such information, is entitled to have that information given to it truthfully, and hence most of the policies, and these policies, provide that if there is deceit, willful misrepresentation, on the part of the insured, the policy may be regarded as void.

Now there are certain distinct defenses set up here to defeat the plaintiff's claim, and you should give fair consideration to these defenses, and ultimately give them such legal effect as under the evidence and under the instructions I give to you they are entitled. In other words, gentlemen, while you are the judges of the issues of fact and it is your duty and your responsibility to find what are the ultimate facts under all the evidence as you have it here, it is likewise your duty to accept the principles of law as I explain them to you, and in good faith to be guided by them and to apply them to the facts as you find them to be, and then, after making such application, to render your verdict accordingly.

Now the first defense to which I desire to call your attention, and perhaps the first one which has occurred in order of time, is that each of these policies contains a provision that it shall be void, that is, shall be of no effect at all, not binding upon the in-

insurance company, unless the insured, the plaintiff here, is the sole and unconditional owner of the property. In other words, when the parties entered into this contract of insurance they agreed, Mr. Enders agreed and the insurance company agreed, that if Mr. Enders was at the time not the sole and unconditional owner of the property insured, then the policy should be of no effect at all, should be void, not merely defective, but void, and about that question a good deal of evidence has centered, and to it much of the argument has been addressed. This phrase in the policy is susceptible to some construction. Without going into details, I have to say this to you, that unless you can find from the evidence that Mr. Enders was in possession of the property under a contract with the owner of it, that is, the owner of the legal title, here stated to be a corporation, the Natural Mineral Water Company, I say unless you can find from the evidence not only that this company had entered into a binding agreement with him to sell him the property, but that he had entered into a binding agreement with it to buy it, then he was not the sole and unconditional owner, and the policy is void. Let me put it in another way. You gentlemen are more or less familiar, at least many of you are, with the difference between what we call a mere option to sell or purchase real estate and a binding agreement to sell it. An option is generally binding only upon the owner, that is,

you, as the owner of property, give to your fellow juror an agreement by which you agree that, upon compliance with certain specified conditions within a certain prescribed time, you will sell to him the described property for a certain price. Now unless he agrees to comply with those conditions and binds himself so to do, binds himself to pay the stipulated price, he has no obligation; he has merely the opportunity or option to buy if he wants to; if he sees fit so to do, within the prescribed period, and upon the conditions which you have named in the option agreement. Now if that was all that was entered into here, in other words, if there was simply an agreement upon the part of the owner of this property to sell it to Mrs. Enders for \$4000, and he to pay that amount within six years, or whenever it was, I say if that was all, he wouldn't be the owner of the property at all,—he would have a mere option. Now you heard his testimony upon cross-examination, that he had an option; if he used that term advisedly he could not recover. Further upon redirect examination he undertook to explain, give an explanation of what he meant by option, and if you believe that testimony, when he used the word "option" he was using it inadvertently, not in its technical meaning, and was using it as descriptive of a binding contract rather than a mere option. Now it is for you to say whether or not he will be bound here by his first statements given in

answer to questions put to him on cross examination, for, as I say to you, if what he had from the owner of the property was a mere option to purchase, a mere right upon his part to take the property for \$4000 if he saw fit to, but no enforceable agreement upon his part to take it, then he could not recover in this action, because the policy would be void, under the clause that I have called to your attention. If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral Water Company, if he had possession of the property under an agreement with that company that they would sell to him and give him a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000 the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause : the policy he would be the unconditional and sole owner of the property. You will see that under the

facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase if he wanted to, or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000. Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn't anything to do with the personal property, the contents of the building, for, as I understand, no question is raised here as to the ownership of the personal property. Is that not right? There is no question raised as to the ownership of the personal property.

MR. SHELTON: Yes, Your Honor; if the policy is void as to one it is void as to the other.

THE COURT: But anyway, I mean there is no question as to matter of fact as to the ownership of the personal property?

MR. SHELTON: None whatever,—merely as to the disability of the contract.

THE COURT: Yes, I understand you.

Coming now to the second proposition, gentlemen: It is further contended by the defendants that, even though you should find that under the instruction I have given you and upon the facts as you find them to be, Mr. Enders is to be regarded as the sole and unconditional owner of the property, that he did not comply with the provision in

the policy which in specific terms requires of an insured formal and detailed proofs of loss within sixty days after the casualty, that is, after the fire occurs. The provision in the policy is very specific upon that point, requiring detailed proofs of loss—and the details are stated,—I need not read them to you,—within sixty days. Now I have to say to you that that provision is binding upon the insured, and is a condition precedent to his right to recover. It is part of the contract. Here it is admitted that no such proofs were made within the sixty days. Now I have further to say to you that while that is an express, binding provision in the policy, and compliance therewith is a condition precedent to the right of the insured to recover, it may be waived by the insurance company, or the company may act in such a way that it is to be regarded as estopped, as we put it, from setting up such an objection or defense; and the contention of the insured here, Mr. Enders, is that these companies did so waive compliance with this provision, and did so act that they should be held to be estopped. By estoppel, generally speaking, is meant that where relations exist between the parties, as here, and one of them is supposed to do something before he has a right to demand performance on the part of the other, if the other party, here the insurance company, acts in such way as to mislead the insured, to his loss, then the insurance company

cannot be heard to assert its right under the policy. To be more specific, if, before the sixty day period expired here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until the sixty-day period had expired, then the companies would be estopped, they would not be heard to set up such a defense or to demand compliance with that provision. You have heard the testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider too the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to and did waive compliance with this provision, or whether at all times then intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the

policies was to be waived.

There is a third proposition by way of defense, to which I have in an indirect way at least already alluded, but it is based upon this provision of the policy: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." You may say whether or not the plaintiff did act fraudulently, did wilfully make false representations, either before or after the loss. Your attention I think has already been called to a certain proof of loss, sworn proof of loss, which he tendered to the insurance companies or their adjusters after they wrote him a letter advising him that he must comply with the terms of the policies, fully comply, and thereupon it seems he sent in this formal proof of loss, which was sworn to. Attention is called to the fact, as claimed at least by the defendants, that there are false statements, material statements as to his ownership of the property and what was due upon it, and the interest of other persons in the property, and if you find that he thereby intended to defraud the defendants or mislead them or deceive them, in those

sworn proofs, and swore falsely as to material facts touching these matters, which were matters of material interest and inquiry to the insurance companies, then you should enforce this provision in the policy, which declares that it shall be void in case of fraud or false swearing by the insured touching any matter relating to the inquiry or the subject thereof, whether before or after loss.

Now if you find upon any of these matters in favor of the defendant, thus holding the policies void or unenforceable, of course you need go no further. If you find upon all of these defenses in favor of the plaintiff, thus holding that he is entitled to recover, then you will consider the matter of his loss. You will understand, gentlemen, that the policies all provide, and it is a matter of public policy, that insurance on property should not be in excess of its value. And here there is an express provision to the effect that in no case, under any circumstances, regardless of the number of policies or their amount, singly or in the aggregate, the maximum that the insured can recover is the actual cash value of the property. In other words, owners of properties are not permitted to profit by fire losses. You can see in a moment why that should be, why as a matter of public policy the owners of property should not profit by having their property burned; the temptation to dishonesty and incendiarism would be too great.

Hence these policies provide that the maximum limit of insurance liability is the actual cash value of the property, and in good faith you must carry out or recognize and be bound by that provision. I need say very little about the personal property. As I have already indicated, there is no question here about the ownership of it, and you are to consider what its actual cash value was at the time of the fire. Now, actual cash value, gentlemen, is what property would sell for upon the market, giving a reasonable time for its sale, what it would sell for for cash, in case the owner is not bound to sell it, but is willing to sell it, and there are people who would like to have it, but are not under any necessity of purchasing it. In other words, it is the value of the property in the open market, where the parties deal under no necessity and may act voluntarily as their interests may dictate. You will consider all the testimony upon this point.

We now come to the value of the real property. You will understand, of course, that this building was a building attached to the soil. The insurance necessarily does not cover the site. As I understand, gentlemen, the policies in this case do not cover the foundations. Is that not right?

MR. SHELTON: Just the buildings.

MR. JONES: I think they do. That leaves the question—on the cost of the question. But it does cover the foundation.

MR. BENTLEY: The coverage of this policy shall not include the cost of foundations or excavations.

MR. JONES: I thought I saw that provision somewhere.

MR. BENTLEY: The coverage of this property shall not include the cost of foundations or excavations, and these items shall not be considered in estimating the value of said building for any purpose under this policy.

THE COURT: The plain provision has now been read. In other words, the policies do not cover the value of the excavations or the foundation of the building. The matter of the value of real property, particularly, gentlemen, is sometimes a most perplexing one, and you have observed here in court in the trial of this case some attempts to prove value. Sometimes the cost of construction is a very fair way of getting at the value of property, but sometimes it is a most misleading method of getting at it. If someone were to put up a large hotel out in the desert, if someone would be so foolish as to do that, it is quite plain that the cost of putting up the hotel would have nothing to do with its real value. The property might be wholly valueless; you might not be able to sell it for any price. That, of course, is an extreme case. So, of course, buildings are sometimes erected very improvidently, or conditions change, so that a building that was

useful for a certain purpose ten years ago may be almost useless or valueless today, because it is inappropriate for the needs. A brewery building, for instance, that was valuable ten years ago in Idaho, may be quite without value today. Those are extreme illustrations, merely to call your attention to the principle.

Now what is regarded as the most reliable principle, if the conditions are such that it is possible to make proof on those lines, is to inquire what property would sell for upon the market, what it can be bought for, what the owner is willing to sell it for, where an owner is under no compulsion again to sell, and where the public has no special need, and hence no compulsion to buy, but where men are willing to buy the property. That is really the best test of the value of property, generally speaking, where it is possible to find out what it will buy and sell for upon the market. That is its actual cash value, what it can be sold for for cash. We may have opinions and estimates more or less speculative and more or less reliable, but if property actually sells upon the open market for a certain price, at a certain time, that is usually the best criterion to which to refer for its value. Now you may take into consideration here the price for which this property was to sell; it wasn't to sell for cash; the purchaser was getting a long time in which to make payment; and you may consider the

conditions of the vendors, the corporation, rather, and those who were interested in it. Were they under any compulsion to sell or were they getting what the property was worth? Now that is not to be taken as conclusive. It is just one of the circumstances of the case, as to what Mr. Enders was to pay for this property. You will consider that, of course, in the light of all of the circumstances; if you find that the vendors were bound to sell, if they were forced to get rid of the property at any price, of course you will regard the price that Mr. Enders was to pay as perhaps being of little value as evidence of the real actual cash value of the property. If you find, however, upon the other hand, that there was no such compulsion, and that they were intelligent men, and getting the best price they thought possible, you may consider it as having stronger evidentiary value, but you are to consider it merely as one of the circumstances of value, and consider it in the light of all other circumstances of the case. This price was fixed some time before the fire. Of course you may find that conditions had changed somewhat. There is some evidence as to value of property in at least two or three different years, there either some increase or some decline,—I have forgotten just what it was—but you will consider that as only one of the circumstances. With some of you it may be regarded as controlling, with others of not so strong eviden-

tiary value. You will bear in mind again that the price which Mr. Enders was to pay for the property was for the entire property, including the site, and of course in using, insofar as you do use, the price that he was to pay, you must deduct therefrom the value of the site, because that isn't covered by the insurance. And you are to consider the changes, of course, which he made in the property, improvements that he has testified and some of the witnesses testified that he put in a substantial amount of money into the property in renovating and re-painting and perhaps re-papering, and fixing the roof, and of course you will take that into consideration as adding some value to the property.

I think I have said enough upon that point to call your attention to the various aspects which you are to consider, your ultimate inquiry all the time, gentlemen, being, what was the actual cash value of this building, exclusive of ground or site, and exclusive of foundations and excavations, what was its actual cash value, on the 7th day of June, 1921, the day it was destroyed by fire. And that is to be the measure of the amount that you award, if you award any amount, in favor of the plaintiff. There again, of course, you will divide the total cash value of the building by four, and charge one-fourth to each one of the insurance companies.

You will be kept together, gentlemen, and be sent

to your luncheon just as soon as the marshal can make provision for it.

These forms of verdict will be handed to you, and if you want any of the exhibits at any time I will send them to you. Let a bailiff be sworn, Mr. Clerk.

(Bailiff sworn.)

THE COURT: You will remain together and not speak to anyone or permit any person to speak to you about the case. You may retire.

(The jury retired from the court room.)

THE COURT: The jury will be deemed to be at the bar, and I will recall them if I decide to make any change in the instructions, but you must take your exceptions now. The plaintiff should first take exceptions, if you have any to take.

MR. JONES: The only exceptions we have to the instructions is to the charge to the jury on the question of fraud, that if they found that the plaintiff had wilfully intended to defraud the defendant by making certain statements in his proof of loss, in this, that we take it that that instruction should have been more definite in explaining that they must also find that the defendant was actually defrauded by such statements, before they would be entitled to hold the policy void.

MR. SHELTON: I have one or two points I would like to present to Your Honor. I do not know whether it was made clear to the jury, but

I will—

That if this contract was void, so far as the illustration was concerned, it also became void as to all of the provisions, for the reason that there was one premium paid, and there is no divisibility of the contract.

A point in regard to the fraud, false swearing, I except to that portion of the charge which presented to the jury the question of false swearing, for the reason that it is undisputed that he did swear falsely, and there is no question whatever as to whether there was any damage or injury done or the purpose or intent with which he made that false affidavit. If he swore to the affidavit, and he admits that he did, and it contained false statements either as to the incumbrance or as to the title, or as to his possession, the question of whether it was injurious to the defendant at all or whether it was done intentionally or with whatever purpose is immaterial.

I also except to the instructions of the Court which submitted to the jury the question of whether he was the sole and unconditional owner of the property, for the reason that in view of the charge of the Court in that regard there is no testimony whatever to warrant a submission to the jury of the question. The Court instructed the jury, as I understand it, that it was necessary, in order that they could find sole and unconditional ownership,

that they should also find that there was a binding obligation on the part of Enders to pay for the property, that it, it could be enforced against him. There is no testimony whatever which would warrant an inference of that character on the part of the jury.

I also wish to except to the charge of the Court, in that the Court failed to instruct the jury that in the proof of loss it was specifically stated that there was a commercial laundry or a laundry in operation, and that the policy was not in force or effect so long as the building was not confined entirely to hotel and apartment purposes.

Another portion of the charge which I desire to except to is that the basis upon which the plaintiff seeks to recover is that he is the owner in possession of the property under an executory contract of sale, in his complaint, and not the owner in fee simple, and by that very allegation he has precluded himself from claiming a right to go to the jury, and I object upon that ground.

THE COURT: I think I will not recall the jury on the matter of the laundry. If my attention had been directed to that earlier I might have instructed, but it is purely a question of fact, and the testimony is so very meager upon the defense that I think I will not instruct them upon that. He did testify at one time, it is true, on cross examination, that some laundry was done for the public, but afterwards he explained that in such a way

that I don't think he offended against the provisions of the policy at all, if his later statements were true.

MR. SHELTON: I was going to say, if the Court please, while counsel are present, in view of the fact that it is very likely that the jury will find a verdict for the plaintiff, I would like to ask the Court for a period of thirty days within which to prepare and serve a bill of exceptions in the case. And in view of the very recent decision of the Circuit Court of Appeals, perhaps not in this circuit but in one of the circuits, I remember, that when the term adjourns—

THE COURT: You needn't discuss that. You may have thirty days for a bill of exceptions, and also thirty days for petition for new trial, so that if it turns out that any of these questions about which there is some serious doubt, if any of these questions should have further consideration, they can be raised upon petition for new trial.

MR. SHELTON: Yes, that was the idea. I thought the bill of exceptions would be prepared for the purpose of preserving the testimony.

THE COURT: New trial is provided for by our local rules, and I think you would have only ten days. I will give either side thirty days for petition for new trial, or for a proposed bill of exceptions, thirty days from today.

MR. SHELTON: And will a stay of execution follow as a matter of course? It does under the

revised statutes, I think.

THE COURT: Have you any objection to a stay of proceedings for thirty days?

MR. JONES: No. Your Honor.

THE COURT: Stay of execution?

MR. JONES: We haven't got it yet.

MR. SHELTON: If the Court please, under the provision of the revised statutes, if petition for new trial is permitted to be filed, it stays all proceedings.

THE COURT: Thirty days stay of execution. Of course, as counsel suggests, you may not have and need for that.

MR. SHELTON: Well, my experience, if the Court please, has been to the contrary.

THE COURT: Exceptions are given to all adverse rulings in connection with the introduction or testimony, and also to rulings upon motions, and I have already given you exceptions to the instructions.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

October term, 1922.

THEODORE ENDERS,

Plaintiff,

vs.

ALLIANCE INSURANCE COMPANY, a
Corporation,

Defendant.

No. 357.

VERDICT.

We, the jury in the above and entitled cause, find for the plaintiff, and assess his damages at the sum of \$3500.00.

NEIL F. BOYLE,
Foreman.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

October term, 1922.

THEODORE ENDERS,

Plaintiff,

vs.

BRITISH & FEDERAL FIRE UNDERWRIT-
ERS OF THE NORWICH UNION FIRE
INSURANCE SOCIETY, Ltd., a Corpor-
ation,

Defendant.

No. 358.

VERDICT.

We, the jury in the above and entitled cause, find for the plaintiff, and assess his damages at the sum of \$3500.00.

NEIL F. BOYLE,
Foreman.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

October term, 1922.

THEODORE ENDERS,

Plaintiff,

vs.

COMMERCIAL UNION ASSURANCE CO.,
Ltd., a Corporation,

Defendant.

No. 359.
VERDICT.

We, the jury in the above and entitled cause, find for the plaintiff, and assess his damages at the sum of \$3500.00.

NEIL F. BOYLE,
Foreman.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

October term, 1922.

THEODORE ENDERS, *Plaintiff,*
vs.
STAR INSURANCE COMPANY OF AMER-
ICA, a Corporation, *Defendant.*

No. 360.
VERDICT.

We, the jury in the above and entitled cause, find for the plaintiff, and assess his damages at the sum of \$3500.00.

NEIL F. BOYLE,
Foreman.

(All verdicts filed Oct. 16, 1922, W. D. McReynolds, Clerk.)

PLAINTIFF'S EXHIBIT NO. 1.

"FRED J. KIESEL

313-314 Col. Hudson Building,
Ogden, Utah.

September Fourth,
1917.

Theodore Enders, Esq.,
Soda Springs, Idaho.

Dear Theodore:—

Have just had a letter from Senator Clark in which he authorizes me to accept your offer of \$4000.00 for the hotel, and the company has been instructed to make out deed to you for that sum, and is awaiting abstract now.

Very truly yours,

FJK/K

FRED J. KIESEL."

PLAINTIFF'S EXHIBIT NO. 2.

"FRED J. KIESEL

313-14 Col. Hudson Building,
Ogden, Utah.

October Twenty-third,
1917.

Mr. Theodore Enders,
Soda Springs, Idaho.

Dear Theodore:—

Abstract of Title to the property which you bought from the Natural Mineral Water Company for \$4,000.00, has just been received. Am having deed prepared now. The Abstract is a very lengthy document and took all this time to get up and bring down to date, hence the delay.

The deed will have to be sent to Senator Clark for his signature, also to be signed by the Secretary Pro-Tem of the Natural Mineral Water Company.

With kindest regards and wishing you success,
and congratulating you on this purchase, which, I
am sure will pay you after repairing, I am,

Very sincerely yours,

FJK/K

FRED J. KIESEL."

PLAINTIFF'S EXHIBIT NO. 3.

"FRED J. KIESEL

313-314 Col. Hudson Building,
Ogden, Utah.

December Fourth,
1917

Theodore Enders, Esq.,
Soda Springs, Idaho.

Dear Theodore:—

Just received letter from Mr. E. M. Falkenberg,
inquiring about the deed for the property in Soda
Springs.

Am having the deed made out now, if I can get
Mr. Clark, who is constantly on the wing, to sign.
However, don't pay any attention to that as you
will get the deed in due course.

We are having very nice weather here now and
I trust the same with you.

With very kindest regards, I am,

Very truly yours,

FJK/K

FRED J. KIESEL."

When you get your new hotel going I will stay
with you for awhile."

PLAINTIFF'S EXHIBIT NO. 4.

"QUIT CLAIM DEED.

THIS INDENTURE, Made this 12th day of April, A. D. 1920, between NATURAL MINERAL WATER COMPANY, a corporation organized and existing under and by virtue of the Laws of the State of Idaho, the party of the first part, and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESSETH:—

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND (\$4,000.00) lawful money of the United States of America, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain lots, pieces or parcels of land situate, lying and being in Caribou County, State of Idaho, to-wit:—

The North Half ($N\frac{1}{2}$) of Lot Four (4), and all of Lot Five (5), in Block Thirty-eight (38), in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

IN WITNESS WHEREOF, the said party of the first part has caused its Corporate Name to be

hereunto subscribed by its President, and its Corporate Seal affixed this 12th day of April, A. D. 1920.

NATURAL MINERAL WATER COMPANY,

By W. A. Clark,

Its President.

STATE OF NEW YORK,)

) ss.

NEW YORK COUNTY,)

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared, WILLIAM A. CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)

AMY BURGESS,

Notary Public.

Residing at 561 W. 174th St.,

New York City.

MY COMMISSION EXPIRES:

Notary Public New York Co. No. 316.

New York County Register No. 2126.

Term expires March 30, 1922."

PLAINTIFF'S EXHIBIT NO. 7.

"WHEREAS,

The Natural Mineral Water Company is the

owner of the north half of the lot numbered Four, and all of the lot numbered Five, in Block 38, Soda Springs, Bannock County, Idaho, and has an opportunity to sell the same for the sum of \$4000.00; Therefore,

Be It Resolved,

By the Board of Directors of said corporation that it is for the best interest of said Company to sell said premises for said sum; and W. A. Clark v president of said Company is hereby directed and authorized to make, execute, and deliver, for and on behalf of this Corporation and as its act and deed, a conveyance of said premises to Theodore Enders, upon his paying to this corporation the sum of \$4000.00, as the consideration for said premises, and to affix to said conveyance the corporate name, and the Seal of this Corporation.

We, the undersigned Directors of said Natural Mineral Water Company, hereby concur in the foregoing Resolution.

FRED J. KIESEL,
T. J. NELSON,
CHAS. H. LINDLEY."

PLAINTIFF'S EXHIBIT NO. 8.

"WILLIAM A. CLARK

20 Exchange Place, New York

April 12th, 1920.

Mr. Fred W. Kiesel,
c/o California National Bank,
Sacramento, California.

Dear Mr. Kiesel:—

I received your favor of the 7th, together with the quit claim deed sent by Shearman for the hotel property to Mr. Enders, who is willing to pay \$4,000 for the property, but I am not satisfied as to the description. It may be absolutely correct but I would want to have it confirmed by someone who is thoroughly conversant with the location. I have submitted the deed to Mr. J. K. Heslet, Butte, Montana, who had a lease on the property for a while, and before it is delivered I want to be sure that the description is correct.

Yours sincerely,

W. A. CLARK."

PLAINTIFF'S EXHIBIT NO. 9.

"H. A. FALKENBERG,

Architect

Soda Springs, Idaho, March 28th, 1919.

Mr. Fred J. Kiesel,
309-310 Hudson Building,
Ogden, Utah.

Friend Kiesel:

Received your letter of March 25th and I am inclosing in this letter check for Two Hundred, Forty

and no hundredths (\$240.00) Dollars, which amount was agreed upon between us as yearly interest to be paid by me until I received the deed for the property. I have not received the deed yet.

I have been in possession of the Idanha now for about one year, having taken over the same about April of 1918. Everything is in about the same condition as when taken over.

Would suggest that I make a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards,
I remain,

Yours very truly,

E/M/F

THEODORE ENDERS,"

The within and foregoing is all the evidence and only evidence introduced at the trial of said cause, and contains a full and complete and correct transcript of all the proceedings in the trial of said cause.

CERTIFICATE OF JUDGE TO BILL OF
EXCEPTIONS.

Thereafter on the 22nd day of November, 1922, and within the time allowed by said U. S. Dis-

trict Court, the defendant duly tendered this, its Bill of Exceptions herein; which having been seen and examined by the Court and Counsel, is by the Court allowed and approved, and is a true Bill of Exceptions, and the said Bill of Exceptions is signed and sealed by the Honorable Frank S. Dietrich, the Judge of said Court, before whom the said proceedings were had, and the same is ordered by said Court to be filed and made a part of the record herein, which is now accordingly done.

Dated this 5th day of February, 1923.

FRANK S. DIETRICH,
Judge of the U. S. District Court,
District of Idaho.

Copy of the within and foregoing draft of Bill of Exceptions, received and service of the same accepted this 10th day of November, 1922.

JONES, PROMEROY & JONES,
STANDROD & STANDROD,
B. W. DAVIS,
T. D. JONES,,

Attorneys for Plaintiff.

Endorsed, Lodged Nov. 22, 1922.

Filed Feb. 5, 1923.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 357.

JUDGMENT.

This action came on regularly for trial. The

said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant, the sum of Three Thousand Five Hundred Dollars (\$3500.00), with interest thereon at the rate of seven per cent (7%) per annum from the date thereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$31.25.

Dated October 16th, 1922.

(Signed) W. D. McREYNOLDS,

Clerk.

Endorsed, Filed Oct. 16, 1922,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 358.

JUDGMENT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury

of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant, the sum of Three Thousand Five Hundred Dollars (\$3500.00), with interest thereon at the rate of seven per cent (7%) per annum from the date thereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$31.25.

Dated October 16th, 1922.

(Signed) W. D. McREYNOLDS,

Clerk.

Endorsed, Filed Oct. 16, 1922,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 359.

JUDGMENT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and

sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant, the sum of Three Thousand Five Hundred Dollars (\$3500.00), with interest thereon at the rate of seven per cent (7%) per annum from the date thereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$31.25.

Dated October 16th, 1922.

(Signed) W. D. McREYNOLDS,

Clerk.

Endorsed, Filed Oct. 16, 1922,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 360.

JUDGMENT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of

plaintiff and defendant were sworn and examined. After hearing evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant, the sum of Three Thousand Five Hundred Dollars (\$3500.00), with interest thereon at the rate of seven per cent (7%) per annum from the date thereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$31.25.

Dated October 16th, 1922.

(Signed) W. D. McREYNOLDS,

Clerk.

Endorsed, Filed Oct. 16, 1922,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Alliance Insurance Company, a Corporation,
Defendant.)

PETITION FOR WRIT OF ERROR.

No. 357.

Now comes the Alliance Insurance Company, a corporation, defendant herein and says that on or

about the 16th day of October, 1922, this Court entered judgment herein in favor of the plaintiff and against this defendant; that thereafter upon a petition for a new trial being filed and presented to the Court the Court on the 27th day of January, 1923, made and entered its decision on said petition for a new trial wherein it decided that a new trial would be granted in said cause unless within thirty (30) days from January 27, 1923, the plaintiff filed in said cause his written consent that the verdict and judgment be reduced from three thousand five hundred (\$3500.00) dollars to three thousand (\$3000.00) dollars, and thereafter on the 12th day of February, 1923, Theodore Enders, the plaintiff in the above entitled cause filed in said cause his written consent that the verdict and judgment entered in said cause be reduced from three thousand five hundred (\$3500.00) dollars to three thousand (\$3000.00) dollars, in which judgment so reduced as aforesaid and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that the transcript of the record proceedings

and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,
WHITE & BENTLEY,

Attorneys for Defendant.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a
Corporation, Defendant.)

No. 358.

PETITION FOR WRIT OF ERROR.

Now comes the British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, a corporation, defendant herein, and says that on or about the 16th day of October, 1922, this Court entered judgment herein in favor of the plaintiff and against this defendant; that thereafter upon a petition for a new trial being filed and presented to the Court the Court on the 27th day of January, 1922, made and entered its decision on said petition for a new trial wherein it decided that a new trial would be granted in said cause unless within thirty (30) days from January 27, 1923, the plaintiff filed in said cause his written consent that the verdict and judgment be reduced from three thousand five hundred (\$3500.00) dollars to three

thousand (\$3000.00) dollars, and thereafter on the 12th day of February, 1923, Theodore Enders, the plaintiff in the above entitled caused filed in said cause his written consent that the verdict and judgment entered in said cause be reduced from three thousand five hundred (\$3500.00) to three thousand (\$3000.00) dollars, in which judgment so reduced as aforesaid and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that the transcript of the record proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,
WHITE & BENTLEY,

Attorneys for Defendant.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Commercial Union Assurance Company, Limited, a Corporation, Defendant.)

No. 359.

PETITION FOR WRIT OF ERROR.

Now comes the Commercial Union Assurance Company, Ltd., a corporation, defendant herein, and says that on or about the 16th day of October, 1922, this Court entered judgment herein in favor of the plaintiff and against this defendant; that thereafter upon a petition for a new trial being filed and presented to the Court, the Court on the 27th day of January, 1923, made and entered its decision on said petition for a new trial wherein it decided that a new trial would be granted in said cause unless within thirty (30) days from January 27, 1923, the plaintiff filed in said cause his written consent that the verdict and judgment be reduced from three thousand five hundred (\$3500.00) dollars to three thousand (\$3000.00) dollars, and thereafter on the 12th day of February, 1923, Theodore Enders, the plaintiff in the above entitled cause filed in said cause his written consent that the verdict and judgment entered in said cause be reduced from three thousand five hundred (\$3500.00) to three thousand (\$3000.00) dollars, in which judgment so reduced as aforesaid and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that the transcript of the record proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,
WHITE & BENTLEY,
Attorneys for Defendant.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Star Insurance Company of America, a Corporation, Defendant.)

No. 360.

PETITION FOR WRIT OF ERROR.

Now comes the Star Insurance Company of America, a corporation, defendant herein and says that on or about the 16th day of October, 1922, this Court entered judgment herein in favor of the plaintiff and against this defendant; that thereafter upon a petition for a new trial being filed and presented to the Court on the 27th day of January, 1923, made and entered its decision on said petition for a new trial wherein it decided that a new trial would be granted in said cause unless within thirty

(30) days from January 27, 1923, the plaintiff filed in said cause his written consent that the verdict and judgment be reduced from three thousand five hundred (\$3500.00) dollars to three thousand (\$3000.00) dollars, and thereafter on the 12th day of February, 1923, Theodore Enders, the plaintiff in the above entitled cause, filed in said cause, his written consent that the verdict and judgment entered in said cause be reduced from three thousand five hundred (\$3500.00) dollars to three thousand (\$3000.00) dollars in which judgment so reduced as aforesaid and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors as complained of and that the transcript of the record proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,
WHITE & BENTLEY,

Attorneys for Defendant.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 357.

(Allionce Insurance Company, a Corporation,
Defendant.)

ASSIGNMENT OF ERRORS.

The defendant in this action in connection with its petition for a writ of error makes the following Assignment of Errors which it avers occurred upon the trial of the cause, to-wit:

I.

The Court erred in permitting the plaintiff to amend his complaint at trial of said cause.

II.

The Court erred in permitting the plaintiff to amend his complaint at the trial of said cause in order to plead a waiver in the nature of an estoppel by the adjuster, of the requirement of the policy that plaintiff furnish proof of loss to defendant.

III.

The Court erred in overruling defendant's objection to any evidence in the case at the opening of plaintiff's case after the first witness, Theodore Enders, had been produced on behalf of plaintiff and duly sworn.

IV.

The Court erred in holding that the provision of the policy "Loss if any on building only, subject,

however, to all the terms and conditions hereinafter set forth, payable to the assured and Fred J. Kiesel tsate mortgagee," was immaterial to the right of the plaintiff to recover when it was made to appear that Fred J. Kiesel Estate was not a mortgagee and had no interest in the property covered by the insurance or in the insurance itself.

V.

The Court erred in holding that the allegations of the complaint that the Fred J. Kiesel Estate was not a mortgagee and had no interest whatever in the property and that the Natural Mineral Water Company as the ultimate owner of the property or the person who had the ultimate title should have been made and specified as the beneficiary in said policy was an immaterial allegation and in no way affected the right of the plaintiff to recover.

VI.

The Court erred in holding that the plaintiff could recover in this action under the allegations of his complaint without any reformation of the contract of insurance to conform to the facts as set forth in his complaint.

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness Theodore Enders, and permitting the witness to testify in response thereto, to-wit:

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have the negotiations with?

A. With the Natural Mineral Water Company through Fred J. Kiesel, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in '17.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.—I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

VIII.

The Court erred in overruling the defendant's objection to the following question asked of witness Theodore Enders.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

IX.

The Court erred in permitting to be introduced in evidence and read to the jury Plaintiff's Exhibit "4", being "Quit Claim Deed" as follows, to-wit:

THIS INDENTURE, Made this 12th day (April, A. D. 1920, between Natural Mineral Water Company, a corporation organized and existing under and by virtue of the Laws of the State of Idaho, the party of the first part and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESSETH:—

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND DOLLARS (\$4,000.00) lawful money of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain lots, pieces or parcels of land situate, lying and being in Caribou County, State of Idaho, to-wit:—

The North Half ($N\frac{1}{2}$) of Lot Four (4), and all of Lot Five (5), in Block Thirty-eight (38), in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

NATURAL MINERAL WATER COMPANY.

By W. A. Clark,
Its President.

Exhibit 4.

[illegible]

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared, WILLIAM A. CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)
AMY BURGESS,
Notary Public.

Residing at 561 W. 174th St.,
New York City.

MY COMMISSION EXPIRES:

Notary Public New York Co., No. 316.
New York County Register No. 2126.
Term expires March 30, 1922.

X.

The Court erred in admitting in evidence Plaintiff's "Exhibit 8" which is as follows:

April 12, 1920.

Mr. Fred W. Kiesel,
c/o California National Bank,
Sacramento, California.

Dear Mr. Kiesel:—

I received your favor of the 7th, together with the quit claim deed sent by Shearman for the hotel property to Mr. Enders, who is willing to pay \$4,000 for the property, but I am not satisfied as to the description. It may be absolutely correct but I would want to have it confirmed by someone who is thoroughly conversant with the location. I have submitted the deed to Mr. J. K. Heslet, Butte, Mont., who had a lease on the property for a while, and before it is delivered I want to be sure that the description is correct.

Yours sincerely,

W. A. CLARK.

XI.

The Court erred in overruling defendant's objection to the following question asked of Witness Shearman and permitting him to answer the same to-wit:

Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to the negotiations for any escrow agreement between the Natural Mineral Water Company and Theodore Enders?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

A. Mr. Enders took up the matter of the sale

of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr. Clerk that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him, and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

Q. Now was there any other conversation with reference to the terms? Did Mr. Clark say anything with reference to the terms that the deed should be left there on?

A. At that particular time I think not, not in my presence.

XII.

The Court erred in admitting in evidence Plaintiff's "Exhibit 9".

H. A. Falkenberg,
Architect.

Soda Springs, Idaho,
March 28, 1919.

Mr. Fred J. Kiesel,
309-310 Hudson Building,
Ogden, Utah.

Friend Kiesel:

Received your letter of March 25th and I am Inclosing in this letter check for Two Hundred, Forty and no hundredths (\$240.00) Dollars, which amount was agreed upon between us as yearly interest to be paid by me until I received the deed for the property. I have not received the deed yet.

I have been in possession of the Idanha now

for about one year, having taken over the same about April of 1918. Everything is in about the same condition as when taken over.

Would suggest that I make a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards, I remain,

Yours very truly,

E/M/F

THEODORE ENDERS."

XIII.

The Court erred in overruling defendant's objection to the following questions asked of Witness Enders, and permitting the witness to answer the same:

Q. At that time did you have any conversation with Mr. Clark in Soda Springs with reference to the purchase of the Idanha Hotel?

A. I suggested to Mr. Clark that the deed be left in Soda Springs, as it would be more convenient for me, and he said—he told me it would be all right and he said "Now, Mr. Enders," he said, "I want you to understand everything you done with Mr. Kiesel I am going to back up."

A. He means to say that Mr. Kiesel, what I talk with him, and bought the Mineral Water Company property, after he died he take his place and it would be just the same with him as it was with Mr. Kiesel, that he back Mr. Kiesel up, and the deed

shall be left there in the Soda Springs Bank, and on me paying the \$4000 then I shall receive the deed.

Q. When you pay the \$4000 you were to receive the deed.

A. Yes.

XIV.

The Court erred in permitting Witness Enders to testify, over defendant's objection, as follows:

"A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years time to pay it in", and he said, "that will be all right, Mr. Enders, six years time to pay it at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us for the last twelve years, and we have tried to show you that we are your friend, we try to do something for you."

A. From the time I took it over.

A. That was the 1st of February, 1918.

XV.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's "Exhibit 23", and permitting the same to be read to the jury as follows, to-wit:

Mr. Davis: Plaintiff's Exhibit 23; (Reading)
"WILLIAM H. JACKSON, JR.
LOANS, REAL ESTATE,
INSURANCE.

Pocatello, Idaho,
June 15th, 1921.

Fred J. Kiesel Estate,
Col. Hudson Bldg.,
Ogden, Utah.

Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, Jr.,

By R. D. Hoskinson."

WHJ-H

XVI.

The Court erred in overruling the defendant's objection to the following question asked of Witness Enders; and permitting witness to testify in response thereto as follows:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expenses in operating it?

A. I took a figure on it for three years, and the net income was \$220 per month.

XVII.

The Court erred in overruling defendant's objection to Plaintiff's "Exhibit 27" and permitting the same to be read in evidence to the jury as follows, to-wit:

"General Office of
WILLIAM A. CLARK,
BUTTE, MONTANA.

August 27th, 1917.

Mr. Fred J. Kiesel,
Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st instant, to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price will you kindly let me know what, if anything, was done. I however, suggested to you that it would be better to take \$4000 rather than miss the sale."

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

XVIII.

The Court erred in overruling defendant's objection to plaintiff's "Exhibit 28" and permitting the same to be read in evidence to the jury as follows, to-wit:

BRITISH & FEDERAL FIRE UNDER-
WRITERS OF LONDON AND NORWICH,
ENGLAND.

PACIFIC DEPARTMENT, 234 Sansome
Street, San Francisco, Cal.

San Francisco, Cal.,
Oct. 19, 1921.

Mr. William H. Jackson, Jr.,
Agent,
Pocatello, Idaho.
DEAR SIR:

CLAIM UNDER POLICY NO. 54277,
ENDERS.

I have for acknowledgement your letter of the 14th inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,

Manager."

XIX.

The Court erred in overruling and denying defendant's motion for non-suit in said cause which said motion was as follows, to-wit:

MR. SHELTON: Now comes the above named defendant, and moves the Court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was only the owner of the option to purchase.

a. The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000, and he has never paid that sum, or any part thereof.

b. The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount; hence the loss necessarily falls on the owner of the property to-wit, the Natural Mineral Water Company.

c. The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

d. The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is not authorized by any vote of the board of directors, and is without seal, and is without validity.

e. It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he

furnished the proof of loss required by the terms of the policy within the sixty days specified, and failure so to do preclude his recovery. The waiver of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with the terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or if the interest of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the Kiesel Estate had no mortgage or lien upon the interest or interest in the property whatever. He stated the same thing in his complaint, and thereby the policy became void by expressed condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The subject of the insurance as specified is as follows: "On the three story shingle roof frame building, and its additions, if any, of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building only while occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho."

The Plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and thereby the terms of the policy were invalidated and the insurance ceased.

XX.

The Court erred in overruling and denying the defendant's motion to instruct the jury to find a verdict for the defendant upon the grounds embodied and specified in the motion for a non-suit.

XXI.

The Court erred in instructing the jury as follows:

"If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral water Company, if he had possession of the property under an agreement with that company that they would sell to him and give him a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000 the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause in the policy he would be the unconditional and sole owner of the property. You will see that under the facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase if he wanted to, or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000."

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The Court erred in instructing the jury as follows, to-wit:

"Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn't anything to do with the personal property, the contents of the building, for, as I understand, no question is raised here as to the ownership of the personal property. If that not right? There is no question raised as to the ownership of the personal property?"

XXIII.

The Court erred in instructing the jury as follows:

“To be more specific, if, before the sixty-day period expired, here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until his sixty-day period had expired, then the companies would be estopped, they would not be heard to set up such a defense or to demand compliance with that provision. You have heard the testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider too the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to and did waive compliance with this provision, or whether at all times they intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the policies was to be waived.”

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The Court erred in instructing the jury as follows, to-wit:

“There is a third proposition by way of defense, to which I have in an indirect way at least already

alluded, but it is based upon this provision of the policy: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.' You may say whether or not the plaintiff did act fraudulently, did wilfully make false representations, either before or after the loss. Your attention, I think, has already been called to a certain proof of loss, sworn proof of loss, which he tendered to the insurance companies or their adjusters after they wrote him a letter advising him that he must comply with the terms of the policies, fully comply, and thereupon it seems he sent in this formal proof of loss, which was sworn to. Attention is called to the fact, as claimed at least by the defendants, that there are false statements, material statements as to his ownership of the property and what was due upon it, and the interest of other persons in the property, and if you find that he thereby intended to defraud the defendants or mislead them or deceive them, in those sworn proofs and swore falsely as to material facts touching these matters, which were matters of material interest and inquiry to the insurance companies, then you should enforce this provision in the policy, which declares that it shall be void in case of fraud or false swearing by the insured touching any matter relating to the inquiry or the subject thereof, whether before or after loss.

XXV.

The Court erred in refusing at the request of the defendant to instruct the jury that in the proof

of loss it was specifically stated that there was a commercial laundry in operation, and that the policy was not in force or effect so long as the building was not confined entirely to hotel and apartment purposes.

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The Court erred in instructing the jury as follows:

“Now I have further to say to you that while that is an express, binding provision in the policy, and compliance therewith is a condition precedent to the right of the insured to recover, it may be waived by the insurance company, or the company may act in such a way that it is to be regarded as estopped, as we put it, from setting up such an objection or defense; and the contention of the insured here, Mr. Enders, is that these companies did so waive compliance with this provision, and did so act that they should be held to be estopped. By estoppel, generally speaking, is meant that where relations exist between the parties, as here, and one of them is supposed to do something before he has a right to demand performance on the part of the other, if the other party, here the insurance company, acts in such way as to mislead the insured, to his loss, then the insurance company cannot be heard to assert its right under the policy.”

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The Court erred in submitting to the jury the question of whether the plaintiff was the owner in fee-simple of the property covered by the insurance, and failing to instruct them that under the allegations of the complaint he could not recover by ascer-

taining that he was the owner in possession of the property under an executory contract of sale and not the owner in fee-simple.

XXVIII.

The Court erred in rendering and entering judgment for the plaintiff on the verdict of the jury.

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The Court erred in receiving and accepting the the verdict of the jury in favor of the plaintiff and against the defendant.

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The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,

WHITE & BENTLEY,

Attorneys for Defendant.

Filed, March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 358.

British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a Cor-
poration, Defendant.)

ASSIGNMENT OF ERRORS.

The defendant in this action in connection with its petition for a writ of error makes the following

Assignment of Errors which it avers occurred upon the trial of the cause, to-wit:

I.

The Court erred in permitting the plaintiff to amend his complaint at trial of said cause.

II.

The Court erred in permitting the plaintiff to amend his complaint at the trial of said cause in order to plead a waiver in the nature of an estoppel by the adjuster, of the requirement of the policy that plaintiff furnish proof of loss to defendant.

III.

The Court erred in overruling defendant's objection to any evidence in the case at the opening of plaintiff's case after the first witness, Theodore Enders, had been produced on behalf of plaintiff and duly sworn.

IV.

The Court erred in holding that the provision of the policy "Loss if any on building only, subject, however, to all the terms and conditions hereinafter set forth, payable to the assured and Fred J. Kiesel estate mortgagee," was immaterial to the right of the plaintiff to recover when it was made to appear that Fred J. Kiesel Estate was not a mortgagee and had no interest in the property covered by the insurance or in the insurance itself.

V.

The Court erred in holding that the allegations of the complaint that the Fred J. Kiesel Estate was not a mortgagee and had no interest whatever in the property and that the Natural Mineral Water Company as the ultimate owner of the property or the person who had the ultimate title should have been made and specified as the beneficiary in said policy was an immaterial allegation and in no way affected the right of the plaintiff to recover.

VI

The Court erred in holding that the plaintiff could recover in this action under the allegations of his complaint without any reformation of the contract of insurance to conform to the facts as set forth in his complaint.

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness Theodore Enders, and permitting the witness to testify in response thereto, to-wit:

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have the negotiations with?

A. With the Natural Mineral Water Company through Fred J. Kiesel, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in '17.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.—I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

VIII.

The Court erred in overruling the defendant's objection to the following question asked of witness Theodore Enders.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

IX.

The Court erred in permitting to be introduced in evidence and read to the jury Plaintiff's Exhibit "4", being "Quit Claim Deed" as follows, to-wit:

THIS INDENTURE, Made this 12th day of April, A. D. 1920, between Natural Mineral Water Company, a corporation organized and existing un-

der and by virtue of the Laws of the State of Idaho, the party of the first part and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESSETH:—

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND DOLLARS (\$4,000.00) lawful money of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain lots, pieces or parcels of land situate, lying and being in Caribou County, State of Idaho, to-wit:—

The North Half ($N\frac{1}{2}$) of Lot Four (4), and all of Lot Five (5), in Block Thirty-eight (38), in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its President, and its Corporate Seal affixed this 12th day of April, A. D. 1920.

NATURAL MINERAL WATER COMPANY.

By W. A. Clark,

Exhibit 4.

Its President.

STATE OF NEW YORK,)
) ss.

New York County,)

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared, WILLIAM A. CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)

AMY BURGESS,

Notary Public.

Residing at 561 W. 174th St.,

New York City.

MY COMMISSION EXPIRES:

Notary Public New York Co., No. 316.

New York County Register No. 2126.

Term expires March 30, 1922.

X.

The Court erred in admitting in evidence Plaintiff's "Exhibit 8" which is as follows:

April 12, 1920.

Mr. Fred W. Kiesel,

c/o California National Bank,

Sacramento, California.

Dear Mr. Kiesel:—

I received your favor of the 7th, together with the quit claim deed sent by Shearman for the hotel property to Mr. Enders, who is willing to pay \$4,000 for the property, but I am not satisfied as to the description. It may be

absolutely correct but I would want to have it confirmed by someone who is thoroughly conversant with the location. I have submitted the deed to Mr. J. K. Heslet, Butte, Mont., who had a lease on the property for a while, and before it is delivered I want to be sure that the description is correct.

Yours sincerely,

W. A. CLARK.

XI.

The Court erred in overruling defendant's objection to the following question asked of Witness Shearman and permitting him to answer the same to-wit:

Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to the negotiations for any escrow agreement between the Natural Mineral Water Company and Theodore Enders?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

A. Mr. Enders took up the matter of the sale of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr. Clerk that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him, and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

Q. Now was there any other conversation with

reference to the terms? Did Mr. Clark say anything with reference to the terms of the deed should be left there on?

A. At that particular time I think not, not in my presence.

XII.

The Court erred in admitting in evidence Plaintiff's "Exhibit 9".

H. A. Falkenberg,
Architect.

Soda Springs, Idaho,
March 28, 1919.

Mr. Fred J. Kiesel,
309-310 Hudson Building,
Ogden, Utah.

Friend Kiesel:

Received your letter of March 25th and I am Inclosing in this letter check for Two Hundred, Forty and no hundredths (\$240.00) Dollars, which amount was agreed upon between us as yearly interest to be paid by me until I received the deed for the property. I have not received the deed yet.

I have been in possession of the Idanha now for about one year, having taken over the same about April of 1918. Everything is in about the same condition as when taken over.

Would suggest that I make a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards, I remain,

Yours very truly,

E/M/F

THEODORE ENDERS."

XIII.

The Court erred in overruling defendant's objection to the following questions asked of Witness Enders, and permitting the witness to answer the same:

Q. At that time did you have any conversation with Mr. Clark in Soda Springs with reference to the purchase of the Idanha Hotel?

A. I suggested to Mr. Clark that the deed be left in Soda Springs, as it would be more convenient for me, and he said—he told me it would be all right and he said “Now, Mr. Enders,” he said, “I want you to understand everything you done with Mr. Kiesel I am going to back up.”

A. He means to say that Mr. Kiesel, what I talk with him, and bought the Mineral Water Company property, after he died he take his place and it would be just the same with him as it was with Mr. Kiesel, that he back Mr. Kiesel up, and the deed shall be left there in the Soda Springs Bank, and on me paying the \$4000 then I shall receive the deed.

Q. When you pay the \$4000 you were to receive the deed.

A. Yes.

XIV.

The Court erred in permitting Witness Enders to testify, over defendant's objection, as follows:

"A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years time to pay it in", and he said, "that will be all right, Mr. Enders, six years time to pay it at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us for the last twelve years, and we have tried to show you that we are your friend, we try to do something for you."

A. From the time I took it over.

A. That was the 1st of February, 1918.

XV.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's "Exhibit 23", and permitting the same to be read to the jury as follows, to-wit:

Mr. Davis: Plaintiff's Exhibit 23; (Reading)

"WILLIAM H. JACKSON, JR.
LOANS, REAL ESTATE,
INSURANCE.

Pocatello, Idaho,
June 15th, 1921.

Fred J. Kiesel Estate,
Col. Hudson Bldg.,
Ogden, Utah.

Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, Jr.,

WHJ-H

By R. D. Hoskinson."

XVI.

The Court erred in overruling the defendant's objection to the following question asked of Witness Enders, and permitting witness to testify in response thereto as follows:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expenses in operating it?

A. I took a figure on it for three years, and the net income was \$220 per month.

XVII.

The Court erred in overruling defendant's objection to Plaintiff's "Exhibit 27" and permitting the same to be read in evidence to the jury as follows, to-wit:

“General Office of
WILLIAM A. CLARK,
BUTTE, MONTANA.

August 27th, 1917.

Mr. Fred J. Kiesel,
Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st instant, to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price will you kindly let me know what, if anything, was done. I however, suggested to you that it would be better to take \$4000 rather than miss the sale.”

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

XVIII.

The Court erred in overruling defendant's objection to plaintiff's "Exhibit 28" and permitting the same to be read in evidence to the jury as follows, to-wit:

BRITISH & FEDERAL FIRE UNDER-
WRITERS OF LONDON AND NORWICH,
ENGLAND.

PACIFIC DEPARTMENT, 234 Sansome
Street, San Francisco, Cal.

San Francisco, Cal.,
Oct. 19, 1921.

Mr. William H. Jackson, Jr.,
Agent,
Pocatello, Idaho.

DEAR SIR:

CLAIM UNDER POLICY NO. 54277,
ENDERS.

I have for acknowledgement your letter of

the 14th inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,
Manager."

XIX.

The Court erred in overruling and denying defendant's motion for non-suit in said cause which said motion was as follows, to-wit:

MR. SHELTON: Now comes the above named defendant, and moves the Court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was only the owner of the option to purchase.

a. The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000, and he has never paid that sum, or any part thereof.

b. The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount; hence the loss necessarily falls on the owner of the property to-wit, the Natural Mineral Water Company.

c. The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

d. The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is not authorized by any vote of the board of directors, and is without seal, and is without validity.

e. It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he furnished the proof of loss required by the terms of the policy within the sixty days specified, and failure so to do preclude his recovery. The waiver

of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with the terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or if the interests of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the Kiesel Estate had no mortgage or lien upon the interest or interest in the property whatever. He stated the same thing in his complaint, and thereby the policy became void by expressed condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of the insurance be a building on ground not owned by the insured in fee simple." The subject of the insurance as specified is as fol-

lows: "On the three story shingle roof frame building, and its additions, if any, of like construction communication and in contact herewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho."

The Plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and thereby the terms of the policy were invalidated and the insurance ceased.

XX.

The Court erred in overruling and denying the defendant's motion to instruct the jury to find a verdict for the defendant upon the grounds embodied and specified in the motion for a non-suit.

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The Court erred in instructing the jury as follows:

“If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral water Company, if he had possession of the property under an agreement with that company that they would sell to him and give him a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000 the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause in the policy he would be the unconditional and sole owner of the property. You will see that under the facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase if he wanted to, or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000.”

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“Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn't anything to do with the personal property, the contents of the building, for, as I understand, no question is raised here as to the ownership of the per-

sonal property. If that not right? There is no question raised as to the ownership of the personal property?"

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"To be more specific, if, before the sixty-day period expired, here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until his sixty-day period had expired, then the companies would be estopped, they would not be heard to set up such a defense or to demand compliance with that provision. You have heard the testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider too the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to and did waive compliance with this provision, or whether at all times they intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the policies was to be waived."

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XXVII.

The Court erred in submitting to the jury the question of whether the plaintiff was the owner in fee-simple of the property covered by the insurance, and failing to instruct them that under the allegations of the complaint he could not recover by ascertaining that he was the owner in possession of the property under an executory contract of sale and not the owner in fee-simple.

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The Court erred in rendering and entering judgment for the plaintiff on the verdict of the jury.

XXIX.

The Court erred in receiving and accepting the the verdict of the jury in favor of the plaintiff and against the defendant.

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The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,

WHITE & BENTLEY,

Attorneys for Defendant.

Filed, March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 359

(Commercial Union Assurance Company, Limited, a Corporation, Defendant.)

ASSIGNMENT OF ERRORS.

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The Court erred in holding that the provision of the policy "Loss if any on building only, subject,

however, to all the terms and conditions hereinafter set forth, payable to the assured and Fred J. Kiesel estate, mortgagee," was immaterial to the right of the plaintiff to recover when it was made to appear that Fred J. Kiesel Estate was not a mortgagee and had no interest in the property covered by the insurance or in the insurance itself.

V.

The Court erred in holding that the allegations of the complaint that the Fred J. Kiesel Estate was not a mortgagee and had no interest whatever in the property and that the Natural Mineral Water Company as the ultimate title should have been made and specified as the beneficiary in said policy was an immaterial allegation and in no way affected the right of the plaintiff to recover.

VI.

The Court erred in holding that the plaintiff could recover in this action under the allegations of his complaint without any reformation of the contract of insurance to conform to the facts as set forth in his complaint.

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness Theodore Enders, and permitting the witness to testify in response thereto, to-wit:

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have the negotiations with?

A. With the Natural Mineral Water Company through Fred J. Kiesel, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in '17.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.—I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

VIII.

The Court erred in overruling the defendant's objection to the following question asked of witness Theodore Enders.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

IX.

The Court erred in permitting to be introduced in evidence and read to the jury Plaintiff's Exhibit "4", being "Quit Claim Deed" as follows, to-wit:

THIS INDENTURE, Made this 12th day of April, A. D. 1920, between Natural Mineral Water Company, a corporation organized and existing under and by virtue of the Laws of the State of Idaho, the party of the first part and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESS ETH:—

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND DOLLARS (\$4,000.00) lawful money of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain lots, pieces or parcels of land situate, lying and being in Caribou County, State of Idaho, to-wit:—

The North Half ($N\frac{1}{2}$) of Lot Four (4), and all of Lot Five (5), in Block Thirty-eight (38), in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its President, and its Corporate Seal affixed this 12th day of April, A. D. 1920.

NATURAL MINERAL WATER COMPANY.

By W. A. Clark,

Exhibit 4.

Its President.

[illegible]

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared, WILLIAM A. CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)

AMY BURGESS.

Notary Public.

Residing at 561 W. 174th St.,
New York City.

MY COMMISSION EXPIRES:

Notary Public New York Co., No. 316.

New York County Register No. 2126.

Term expires March 30, 1922.

X.

The Court erred in admitting in evidence Plaintiff's "Exhibit 8" which is as follows:

April 12, 1920.

Mr. Fred W. Kiesel,
c/o California National Bank,
Sacramento, California.

Dear Mr. Kiesel:—

I received your favor of the 7th, together with the quit claim deed sent by Shearman for the hotel property to Mr. Enders, who is willing to pay \$4,000 for the property, but I am not satisfied as to the description. It may be absolutely correct but I would want to have it confirmed by someone who is thoroughly conversant with the location. I have submitted the deed to Mr. J. K. Heslet, Butte, Mont., who had a lease on the property for a while, and before it is delivered I want to be sure that the description is correct.

Yours sincerely,

W. A. CLARK.

XI.

The Court erred in overruling defendant's objection to the following question asked of Witness Shearman and permitting him to answer the same to-wit:

Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to the negotiations for any escrow agreement between the Natural Mineral Water Company and Theodore Enders?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

A. Mr. Enders took up the matter of the sale

of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr. Clark that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him, and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

Q. Now was there any other conversation with reference to the terms? Did Mr. Clark say anything with reference to the terms that the deed should be left there on?

A. At that particular time I think not, not in my presence.

XII.

The Court erred in admitting in evidence Plaintiff's "Exhibit 9".

H. A. Falkenberg,
Architect.

Soda Springs, Idaho,
March 28, 1919.

Mr. Fred J. Kiesel,
309-310 Hudson Building,
Ogden, Utah.

Friend Kiesel:

Received your letter of March 25th and I am Inclosing in this letter check for Two Hundred, Forty and no hundredths (\$240.00) Dollars, which amount was agreed upon between us as yearly interest to be paid by me until I received the deed for the property. I have not received the deed yet.

I have been in possession of the Idanha now for about one year, having taken over the same

about April of 1918. Everything is in about the same condition as when taken over.

Would suggest that I make a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards, I remain,

Yours very truly,

E/M/F

THEODORE ENDERS."

XIII.

The Court erred in overruling defendant's objection to the following questions asked of Witness Enders, and permitting the witness to answer the same:

Q. At that time did you have any conversation with Mr. Clark in Soda Springs with reference to the purchase of the Idanha Hotel?

A. I suggested to Mr. Clark that the deed be left in Soda Springs, as it would be more convenient for me, and he said—he told me it would be all right and he said "Now, Mr. Enders," he said, "I want you to understand everything you done with Mr. Kiesel I am going to back up."

A. He means to say that Mr. Kiesel, what I talk with him, and bought the Mineral Water Company property, after he died he take his place and it would be just the same with him as it was with Mr. Kiesel, that he back Mr. Kiesel up, and the deed shall be left there in the Soda Springs Bank, and

on me paying the \$4000 then I shall receive the deed.

Q. When you pay the \$4000 you were to receive the deed.

A. Yes.

XIV.

The Court erred in permitting Witness Enders to testify, over defendant's objection, as follows:

"A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years time to pay it in", and he said, "that will be all right, Mr. Enders, six years time to pay it at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us for the last twelve years, and we have tried to show you that we are your friend, we try to do something for you."

A. From the time I took it over.

A. That was the 1st of February, 1918.

XV.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's "Exhibit 23", and permitting the same to be read to the jury as follows, to-wit:

Mr. Davis: Plaintiff's Exhibit 23; (Reading)

PLAINTIFF'S EXHIBIT NO. 23.

"WILLIAM H. JACKSON, JR.
LOANS, REAL ESTATE,
INSURANCE.

Pocatello, Idaho,
June 15th, 1921.

Fred J. Kiesel Estate,
Col. Hudson Bldg.,
Ogden, Utah.

Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, Jr.,
By R. D. Hoskinson."

WHJ-H

XVI.

The Court erred in overruling the defendant's objection to the following question asked of Witness Enders, and permitting witness to testify in response thereto as follows:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expenses in operating it?

A. I took a figure on it for three years, and the net income was \$220 per month.

XVII.

The Court erred in overruling defendant's objection to Plaintiff's "Exhibit 27" and permitting the same to be read in evidence to the jury as follows, to-wit:

"General Office of
WILLIAM A. CLARK,
BUTTE, MONTANA.

August 27th, 1917.

Mr. Fred J. Kiesel,
Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st instant, to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price will you kindly let me know what, if anything, was done. I however, suggested to you that it would be better to take \$4000 rather than miss the sale."

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

XVIII.

The Court erred in overruling defendant's objection to plaintiff's "Exhibit 28" and permitting the same to be read in evidence to the jury as follows, to-wit:

BRITISH & FEDERAL FIRE UNDER-
WRITERS OF LONDON AND NORWICH,
ENGLAND.

PACIFIC DEPARTMENT, 234 Sansome
Street, San Francisco, Cal.

San Francisco, Cal.,
Oct. 19, 1921.

Mr. William H. Jackson, Jr.,
Agent,
Pocatello, Idaho.
DEAR SIR:

CLAIM UNDER POLICY NO. 54277,
ENDERS.

I have for acknowledgement your letter of the 14th inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,

Manager."

XIX.

The Court erred in overruling and denying defendant's motion for non-suit in said cause which said motion was as follows, to-wit:

MR. SHELTON: Now comes the above named defendant, and moves the Court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was only the owner of the option to purchase.

a. The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000, and he has never paid that sum, or any part thereof.

b. The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount; hence the loss necessarily falls on the owner of the property to-wit, the Natural Mineral Water Company.

c. The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

d. The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is not authorized by any vote of the board of directors, and is without seal, and is without validity.

e. It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he

furnished the proof of loss required by the terms of the policy within the sixty days specified, and failure so to do preclude his recovery. The waiver of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with the terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or if the interest of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the Kiesel Estate had no mortgage or lien upon the interest or interest in the property whatever. He stated the same thing in his complaint, and thereby the policy became void by expressed condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The subject of the insurance as specified is as follows: "On the three story shingle roof frame building, and its additions, if any, of like construction communicating and in contact therewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building only while occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho."

The Plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and thereby the terms of the policy were invalidated and the insurance ceased.

XX.

The Court erred in overruling and denying the defendant's motion to instruct the jury to find a verdict for the defendant upon the grounds embodied and specified in the motion for a non-suit.

XXI.

The Court erred in instructing the jury as follows:

"If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral water Company, if he had possession of the property under an agreement with that company that they would sell to him and give him a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000 the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause in the policy he would be the unconditional and sole owner of the property. You will see that under the facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase if he wanted to, or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000."

XXII.

The Court erred in instructing the jury as follows, to-wit:

"Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn't anything to do with the personal property, the contents of the building, for, as I understand, no question is raised here as to the ownership of the personal property. If that not right? There is no question raised as to the ownership of the personal property?"

XXIII.

The Court erred in instructing the jury as follows:

“To be more specific, if, before the sixty-day period expired, here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until his sixty-day period had expired, then the companies would be estopped, they would not be heard to set up such a defense or to demand compliance with that provision. You have heard the testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider too the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to and did waive compliance with this provision, or whether at all times they intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the policies was to be waived.”

XXIV.

The Court erred in instructing the jury as follows, to-wit:

“There is a third proposition by way of defense, to which I have in an indirect way at least already

alluded, but it is based upon this provision of the policy: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.' You may say whether or not the plaintiff did act fraudulently, did wilfully make false representations, either before or after the loss. Your attention, I think, has already been called to a certain proof of loss, sworn proof of loss, which he tendered to the insurance companies or their adjusters after they wrote him a letter advising him that he must comply with the terms of the policies, fully comply, and thereupon it seems he sent in this formal proof of loss, which was sworn to. Attention is called to the fact, as claimed at least by the defendants, that there are false statements, material statements as to his ownership of the property and what was due upon it, and the interest of other persons in the property, and if you find that he thereby intended to defraud the defendants or mislead them or deceive them, in those sworn proofs and swore falsely as to material facts touching these matters, which were matters of material interest and inquiry to the insurance companies, then you should enforce this provision in the policy, which declares that it shall be void in case of fraud or false swearing by the insured touching any matter relating to the inquiry or the subject thereof, whether before or after loss.

XXV.

The Court erred in refusing at the request of the defendant to instruct the jury that in the proof

of loss it was specifically stated that there was a commercial laundry in operation, and that the policy was not in force or effect so long as the building was not confined entirely to hotel and apartment purposes.

XXVI.

The Court erred in instructing the jury as follows:

“Now I have further to say to you that while that is an express, binding provision in the policy, and compliance therewith is a condition precedent to the right of the insured to recover, it may be waived by the insurance company, or the company may act in such a way that it is to be regarded as estopped, as we put it, from setting up such an objection or defense; and the contention of the insured here, Mr. Enders, is that these companies did so waive compliance with this provision, and did so act that they should be held to be estopped. By estoppel, generally speaking, is meant that where relations exist between the parties, as here, and one of them is supposed to do something before he has a right to demand performance on the part of the other, if the other party, here the insurance company, acts in such way as to mislead the insured, to his loss, then the insurance company cannot be heard to assert its right under the policy.”

XXVII.

The Court erred in submitting to the jury the question of whether the plaintiff was the owner in fee-simple of the property covered by the insurance, and failing to instruct them that under the allegations of the complaint he could not recover by ascer-

taining that he was the owner in possession of the property under an executory contract of sale and not the owner in fee-simple.

XXVIII.

The Court erred in rendering and entering judgment for the plaintiff on the verdict of the jury.

XXIX.

The Court erred in receiving and accepting the the verdict of the jury in favor of the plaintiff and against the defendant.

XXX.

The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,
WHITE & BENTLEY,
Attorneys for Defendant.

Filed, March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 360.

Star Insurance Company of America, a Corporation, Defendant.)

ASSIGNMENT OF ERRORS.

The defendant in this action in connection with its petition for a writ of error makes the following

Assignment of Errors which it avers occurred upon the trial of the cause, to-wit:

I.

The Court erred in permitting the plaintiff to amend his complaint at trial of said cause.

II.

The Court erred in permitting the plaintiff to amend his complaint at the trial of said cause in order to plead a waiver in the nature of an estoppel by the adjuster, of the requirement of the policy that plaintiff furnish proof of loss to defendant.

III.

The Court erred in overruling defendant's objection to any evidence in the case at the opening of plaintiff's case after the first witness, Theodore Enders, had been produced on behalf of plaintiff and duly sworn.

IV.

The Court erred in holding that the provision of the policy "Loss if any on building only, subject, however, to all the terms and conditions hereinafter set forth, payable to the assured and Fred J. Kiesel estate mortgagee," was immaterial to the right of the plaintiff to recover when it was made to appear that Fred J. Kiesel Estate was not a mortgagee and had no interest in the property covered by the insurance or in the insurance itself.

V.

The Court erred in holding that the allegations of the complaint that the Fred J. Kiesel Estate was not a mortgagee and had no interest whatever in the property and that the Natural Mineral Water Company as the ultimate owner of the property or the person who had the ultimate title should have been made and specified as the beneficiary in said policy was an immaterial allegation and in no way affected the right of the plaintiff to recover.

VI

The Court erred in holding that the plaintiff could recover in this action under the allegations of his complaint without any reformation of the contract of insurance to conform to the facts as set forth in his complaint.

VII.

The Court erred in overruling defendant's objection to the following question asked of the witness Theodore Enders, and permitting the witness to testify in response thereto, to-wit:

Q. Did you have any negotiations with reference to the purchase of the Idanha Hotel and the land it stood on?

A. Yes, sir.

Q. Who did you have the negotiations with?

A. With the Natural Mineral Water Company through Fred J. Kiesel, through Clark.

Q. W. A. Clark?

A. Yes.

Q. When was that, Mr. Enders?

A. You mean to say—

Q. When you had your first negotiations.

A. That was in '17.

Q. Yes. Did you make arrangements for the purchase of the property at that time?

A. I did with Mr.—I did, yes.

Q. You did, yes. Was that your answer?

A. Yes, I did.

Q. Were those negotiations with Mr. Kiesel orally?

A. Yes, sir.

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The Court erred in overruling the defendant's objection to the following question asked of witness Theodore Enders.

Q. Did you purchase the hotel at that time, Mr. Enders?

A. Yes, sir.

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der and by virtue of the Laws of the State of Idaho, the party of the first part and THEODORE ENDERS, of Soda Springs, Caribou County, State of Idaho, the party of the second part, WITNESSETH:—

That the said party of the first part, for and in consideration of the sum of FOUR THOUSAND DOLLARS (\$4,000.00) lawful money of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, convey and quit claim unto the said party of the second part, all of those certain lots, pieces or parcels of land situate, lying and being in Caribou County, State of Idaho, to-wit:—

The North Half ($N\frac{1}{2}$) of Lot Four (4), and all of Lot Five (5), in Block Thirty-eight (38), in Soda Springs, Caribou County, State of Idaho.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns.

IN WITNESS WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed by its President, and its Corporate Seal affixed this 12th day of April, A. D. 1920.

NATURAL MINERAL WATER COMPANY.

By W. A. Clark,

Its President.

Exhibit 4.

STATE OF NEW YORK,)
) ss.

New York County,)

On this 12th day of April, A. D. 1920, before me, Amy Burgess, a Notary Public in and for said County and State, personally appeared, WILLIAM A. CLARK, known to me to be the President of the Corporation that executed the above and foregoing instrument, and acknowledged to me that said corporation executed the same.

(Notarial Seal)

AMY BURGESS,

Notary Public.

Residing at 561 W. 174th St.,

New York City.

MY COMMISSION EXPIRES:

Notary Public New York Co., No. 316.

New York County Register No. 2126.

Term expires March 30, 1922.

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Sacramento, California.

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Yours sincerely,

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Q. Did you have any conversation with Mr. Clark with reference to this deed, with reference to the negotiations for any escrow agreement between the Natural Mineral Water Company and Theodore Enders?

A. Yes.

Q. Will you relate what that was, Mr. Shearman?

A. Mr. Enders took up the matter of the sale of the property, or the purchase of the property, with Mr. Clark, and my best recollection is that he told Mr. Clark that he would like to have the deed left at the Bank of Soda Springs, that it was more convenient for him, and that he would take it up there, and Mr. Clark said as far as he was concerned that was perfectly agreeable.

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reference to the terms? Did Mr. Clark say anything with reference to the terms that the deed should be left there on?

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Friend Kiesel:

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Would suggest that I make a trip to Ogden in the very near future and then I can see you personally and talk all business matters over thoroughly with you. I can then answer all questions you may wish to ask.

Expecting to see you soon and with best regards, I remain,

Yours very truly,

E/M/F

THEODORE ENDERS."

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XIV.

The Court erred in permitting Witness Enders to testify, over defendant's objection, as follows:

"A. I told Mr. Clark, I says, "How about payment, Mr. Clark? Mr. Kiesel agreed to give me six years time to pay it in", and he said, "that will be all right, Mr. Enders, six years time to pay it at six per cent, and they wasn't in any hurry, they didn't need the money very bad, they didn't want to press me any. He said, "We know, Mr. Enders, we want you to have that property, and we know you are entitled to it; you have worked for us for the last twelve years, and we have tried to show you that we are your friend, we try to do something for you."

A. From the time I took it over.

A. That was the 1st of February, 1918.

XV.

The Court erred in overruling defendant's objection to the introduction in evidence of Plaintiff's "Exhibit 23", and permitting the same to be read to the jury as follows, to-wit:

Mr. Davis: Plaintiff's Exhibit 23; (Reading)

"WILLIAM H. JACKSON, JR.
LOANS, REAL ESTATE,
INSURANCE.

Pocatello, Idaho,
June 15th, 1921.

Fred J. Kiesel Estate,
Col. Hudson Bldg.,
Ogden, Utah.

Gentlemen:

I have your letter of the 14th inst. regarding the insurance on the Idanha Hotel at Soda Springs.

I think the adjusters are working on this loss now and will probably want the policies within a short time and when they do I will let you know.

I will keep you advised as the case progresses. There is nothing we can do at present.

Yours truly,

WM. H. JACKSON, Jr.,

By R. D. Hoskinson."

WHJ-H

XVI.

The Court erred in overruling the defendant's objection to the following question asked of Witness Enders, and permitting witness to testify in response thereto as follows:

Q. Mr. Enders, during the year from about June 7th, 1920, until June 7th, 1921, what was the average income to you per month from the Idanha Hotel, exclusive of the expenses in operating it?

A. I took a figure on it for three years, and the net income was \$220 per month.

XVII.

The Court erred in overruling defendant's objection to Plaintiff's "Exhibit 27" and permitting the same to be read in evidence to the jury as follows, to-wit:

"General Office of
WILLIAM A. CLARK,
BUTTE, MONTANA.

August 27th, 1917.

Mr. Fred J. Kiesel,
Ogden, Utah.

Dear Sir:

Referring again to your favor of the 1st instant, to which I replied with the suggestion that possibly the parties desirous of purchasing the hotel at Soda Springs might be willing to increase the price will you kindly let me know what, if anything, was done. I however, suggested to you that it would be better to take \$4000 rather than miss the sale."

MR. DAVIS: The last paragraph I won't read; it has nothing to do with the case.

XVIII.

The Court erred in overruling defendant's objection to plaintiff's "Exhibit 28" and permitting the same to be read in evidence to the jury as follows, to-wit:

BRITISH & FEDERAL FIRE UNDER-
WRITERS OF LONDON AND NORWICH,
ENGLAND.

PACIFIC DEPARTMENT, 234 Sansome
Street, San Francisco, Cal.

San Francisco, Cal.,
Oct. 19, 1921.

Mr. William H. Jackson, Jr.,
Agent,
Pocatello, Idaho.

DEAR SIR:

CLAIM UNDER POLICY NO. 54277,
ENDERS.

I have for acknowledgement your letter of

the 14th inst., in which you make inquiry as to the status of this claim owing to the great length of time since the fire occurred.

I can only say that circumstances surrounding the case are very unsatisfactory with respect to the title as affecting the real property described in the policies of insurance.

The case is in the hands of the adjusters and will be dealt with upon its merits or demerits as may be shown by the facts in the case when they may be unravelled.

I can only say that we must await the result of our adjuster's further action in the matter.

Yours very truly,

J. L. FULLER,
Manager."

XIX.

The Court erred in overruling and denying defendant's motion for non-suit in said cause which said motion was as follows, to-wit:

MR. SHELTON: Now comes the above named defendant, and moves the Court to grant a non-suit in this case, upon the following grounds:

1. That plaintiff has failed to show that he was the sole and unconditional owner of the property, namely, the Idanha Hotel, but was only the owner of the option to purchase.

- a. The deed was placed in the Bank of Soda Springs to be delivered to him upon the payment of \$4000, and he has never paid that sum, or any part thereof.

b. The agreement on which he relies does not bind him to make the payment unless he so elects, and there is no valid contract which can be enforced to compel him to pay the amount; hence the loss necessarily falls on the owner of the property to-wit, the Natural Mineral Water Company.

c. The agreement which he claims to have had with Kiesel and Clark might bind them to convey to him, but there is no evidence to establish that they could enforce collection and compel him to purchase the property if he did not so choose.

d. The Natural Mineral Water Company is not shown to have ever authorized the execution or delivery in escrow of any deed, or any deed whatever, to the plaintiff, and the deed executed by Clark is not authorized by any vote of the board of directors, and is without seal, and is without validity.

e. It is necessary, for plaintiff to recover, that he show clearly and by competent evidence that he was the unconditional owner of the property, by clear and positive proof.

2. The plaintiff must show, as a condition precedent to his right to recover, that he gave notice as required by the terms of the policy, and that he furnished the proof of loss required by the terms of the policy within the sixty days specified, and failure so to do preclude his recovery. The waiver

of the proof of loss attempted to be pleaded is not established by any evidence, and plaintiff has no valid excuse for not complying with the terms of his policy under the terms thereof.

3. The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact, or if the interests of the assured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss. Plaintiff specifically sets forth in his proof of loss, sworn to by him and made in the form of an affidavit, that the Kiesel Estate holds a lien upon the property to secure an indebtedness in the sum of \$5400. He stated on the stand that this was untrue, and that the Kiesel Estate had no mortgage or lien upon the interest or interest in the property whatever. He stated the same thing in his complaint, and thereby the policy became void by expressed condition therein contained.

4. The policy contained the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of the insurance be a building on ground not owned by the insured in fee simple." The subject of the insurance as specified is as fol-

lows: "On the three story shingle roof frame building, and its additions, if any, of like construction communicating and in contact herewith, including foundations, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for hotel and apartment purposes, situate No. 70-75 on the east side of Dillon Street, between Hooper and Railroad Streets, in Soda Springs, Idaho."

The Plaintiff at no time ever had a fee simple title to the ground on which the building stood.

5. The insurance was valid and enforceable only so long as the building was occupied for hotel and apartment purposes. The five rooms on the ground floor were occupied by a commercial laundry, and thereby the terms of the policy were invalidated and the insurance ceased.

XX.

The Court erred in overruling and denying the defendant's motion to instruct the jury to find a verdict for the defendant upon the grounds embodied and specified in the motion for a non-suit.

XXI.

The Court erred in instructing the jury as follows:

“If upon the other hand you find that he had possession of the property under an agreement with the owner, the Natural Water Company, Mineral water Company, if he had possession of the property under an agreement with that company that they would sell to him and give him a deed for a certain stipulated price and within a certain length of time, and upon certain specified conditions, and upon the other hand he himself had entered into an obligation to take it upon that condition, so that the minds of the two parties met, one being obligated in law to sell and the other being equally obligated in law to buy, so that if he didn't pay the \$4000 the Mineral Water Company could have sued him and recovered judgment against him for the amount, I say if those were the conditions, then the contract was not a mere option, but was absolute on the part of each party thereto, and under the construction to be put upon this clause in the policy he would be the unconditional and sole owner of the property. You will see that under the facts of the case the critical question upon that defense is as to whether or not Mr. Enders had a mere right to purchase if he wanted to, or whether he had bound himself to purchase, to buy, and hence had become absolutely obligated to the company to pay the \$4000.”

XXII.

The Court erred in instructing the jury as follows, to-wit:

“Of course you will understand, gentlemen, that this defense is applicable only to the statements of the insurance policy covering the building; it hasn't anything to do with the personal property, the contents of the building, for, as I understand, no question is raised here as to the ownership of the per-

sonal property. If that not right? There is no question raised as to the ownership of the personal property?"

XXIII.

The Court erred in instructing the jury as follows:

"To be more specific, if, before the sixty-day period expired, here, the insurance company, through its agents and adjusters, lulled the plaintiff into the belief, and he acted reasonably under all the circumstances, if, I say, acting reasonably, he was lulled into the belief, lulled by them, that these formal proofs were unnecessary, that they would not be required, that he need not go to the trouble of making them, and permitted him to act upon that belief until his sixty-day period had expired, then the companies would be estopped, they would not be heard to set up such a defense or to demand compliance with that provision. You have heard the testimony upon that point, and you are to say whether or not the companies, through their agencies, did so lead the plaintiff to believe, and whether he did act reasonably in acting upon such belief. You may consider too the conduct of the defendants as shown by their authorized agents, even after the sixty-day period elapsed, as bearing upon the question as to whether or not they intended to and did waive compliance with this provision, or whether at all times they intended to demand compliance therewith. Consider the letters which were written and the conversations which were had, as you may find them to be, and say whether or not there was a waiver, whether both parties understood that compliance with this provision in the policies was to be waived."

XXIV.

The Court erred in instructing the jury as follows, to-wit:

“There is a third proposition by way of defense, to which I have in an indirect way at least already alluded, but it is based upon this provision of the policy: ‘This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.’ You may say whether or not the plaintiff did act fraudulently, did wilfully make false representations, either before or after the loss. Your attention, I think, has already been called to a certain proof of loss, sworn proof of loss, which he tendered to the insurance companies or their adjusters after they wrote him a letter advising him that he must comply with the terms of the policies, fully comply, and thereupon it seems he sent in this formal proof of loss, which was sworn to. Attention is called to the fact, as claimed at least by the defendants, that there are false statements, material statements as to his ownership of the property and what was due upon it, and the interest of other persons in the property, and if you find that he thereby intended to defraud the defendants or mislead them or deceive them, in those sworn proofs and swore falsely as to material facts touching these matters, which were matters of material interest and inquiry to the insurance companies, then you should enforce this provision in the policy, which declares that it shall be void in case of fraud or false swearing by the insured touching any matter relating to

the inquiry or the subject thereof, whether before or after loss.

XXV.

The Court erred in refusing at the request of the defendant to instruct the jury that in the proof of loss it was specifically stated that there was a commercial laundry in operation, and that the policy was not in force or effect so long as the building was not confined entirely to hotel and apartment purposes.

XXVI.

The Court erred in instructing the jury as follows:

“Now I have further to say to you that while that is an express, binding provision in the policy, and compliance therewith is a condition precedent to the right of the insured to recover, it may be waived by the insurance company, or the company may act in such a way that it is to be regarded as estopped, as we put it, from setting up such an objection or defense; and the contention of the insured here, Mr. Enders, is that these companies did so waive compliance with this provision, and did so act that they should be held to be estopped. By estoppel, generally speaking, is meant that where relations exist between the parties, as here, and one of them is supposed to do something before he has a right to demand performance on the part of the other, if the other party, here the insurance company, acts in such way as to mislead the insured, to his loss, then the insurance company cannot be heard to assert its right under the policy.”

XXVII.

The Court erred in submitting to the jury the question of whether the plaintiff was the owner in fee-simple of the property covered by the insurance, and failing to instruct them that under the allegations of the complaint he could not recover by ascertaining that he was the owner in possession of the property under an executory contract of sale and not the owner in fee-simple.

XXVIII.

The Court erred in rendering and entering judgment for the plaintiff on the verdict of the jury.

XXIX.

The Court erred in receiving and accepting the the verdict of the jury in favor of the plaintiff and against the defendant.

XXX.

The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,

WHITE & BENTLEY,

Attorneys for Defendant.

Filed, March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Alliance Insurance Company, a Corporation,
Defendant.)

No. 357.

ORDER ALLOWING WRIT OF ERROR.

This 20th day of March, 1923, came the defendant, by its attorney and filed herein and presented to the Court, its petition, praying for the allowance of the writ of error, an assignment of errors intended to be urged by it, praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of \$3500.00 which shall operate as a supersedeas bond.

FRANK S. DIETRICH,

Judge.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a Corporation,
Defendant.)

No. 358.

ORDER ALLOWING WRIT OF ERROR.

This 20th day of March, 1923, came the defendant, by its attorney and filed herein and presented to the Court, its petition, praying for the allowance of the writ of error, an assignment of errors intended to be urged by it, praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of \$3500.00 which shall operate as a supersedeas bond.

FRANK S. DIETRICH,

Judge.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Commercial Union Assurance Company, Ltd.,
a Corporation, Defendant.)

No. 359

ORDER ALLOWING WRIT OF ERROR.

This 20th day of March, 1923, came the defendant, by its attorney and filed herein and presented to the Court, its petition, praying for the allowance of the writ of error, an assignment of errors in-

tended to be urged by it, praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of \$3500.00 which shall operate as a supersedeas bond.

FRANK S. DIETRICH,

Judge.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Star Insurance Company of America, a Corporation, Defendant.)

No. 360.

ORDER ALLOWING WRIT OF ERROR.

This 20th day of March, 1923, came the defendant, by its attorney and filed herein and presented to the Court, its petition, praying for the allowance of the writ of error, an assignment of errors intended to be urged by it, praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Cir-

cuit Court of Appeals, for the Ninth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of \$3500.00 which shall operate as a supersedeas bond.

FRANK S. DIETRICH,

Judge.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Alliance Insurance Company, a Corporation,
Defendant.)

No. 357.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That the Alliance Insurance Company, a corporation, as principal and Aetna Casualty and Surety Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the defendant in error, Theodore Enders, in the full sum of Thirty-five Hundred (\$3500.00) Dollars to be paid to the said defendant, Theodore Enders, his certain attorneys, executors, and administrators, or assignees, to which payment, all and truly to be made, we bind ourselves and our successors, jointly and separately by these presents. Sealed with our seals, and dated this 5th day of March, 1923.

WHEREAS, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in the said Court between Theodore Enders, plaintiff, and Alliance Insurance Company, a corporation, defendant, a judgment was rendered against the said defendant, Alliance Insurance Company, a corporation, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore Enders, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California in the said Circuit on the 19th day of April, next.

Now the condition of the above obligation is such, that if the said Alliance Insurance Company of America shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void.

ALLIANCE INSURANCE COMPANY,
a Corporation.

By George F. Shelton,

Its Attorney.

THE AETNA CASUALTY AND SURE-
TY COMPANY.

By Paul Wolcott,

Resident Vice-President.

Attest: Sibyl G. Zabel,
Resident Asst. Secretary.

Approved by
FRANK S. DIETRICH,
District Judge.

(SEAL)
BRADY-McGOWAN COMPANY,
By F. C. McGowan,
Resident Agent.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a Cor-
poration, Defendant.)

No. 358.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:
That the British & Federal Fire Underwriters of
the Norwich Union Fire Insurance Society, a cor-
poration, as principal and Aetna Casualty and Sure-
ty Company, of Hartford, Connecticut, as surety,
are held and firmly bound unto the defendant in
error, Theodore Enders, in the full sum of Thirty-
five Hundred (\$3500.00) Dollars to be paid to the
said defendant, Theodore Enders, his certain at-
torneys, executors, and administrators, or assigns,
to which payment, well and truly to be made, we
bind ourselves and our successors, jointly and sepa-
rately by these presents. Seal with our seals, and
dated this 5th day of March, 1923.

WHEREAS, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in the said Court between Theodore Enders, plaintiff, and British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, a corporation, defendant, a judgment was rendered against the said defendant, the British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, a corporation, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore Enders, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California in the said Circuit on the 19th day of April, next.

Now the condition of the above obligation is such, that if the said British & Federal Fire Underwriters of the Norwich Union Fire Insurance Society, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void.

BRITISH & FEDERAL FIRE UNDER-
WRITERS OF THE NORWICH UN-
ION FIRE INSURANCE SOCIETY,
a Corporation.

By George F. Shelton,
Its Attorney.

THE AETNA CASUALTY AND SURE-
TY COMAPANY.By Paul Wolcott,
*Resident Vice-President.*Attest: Sibyl G. Zabel,
*Resident Asst. Secretary.*Approved by
FRANK S. DIETRICH,
District Judge.(SEAL)
BRADY-McGOWAN COMPANY,
By F. C. McGowan,
*Resident Agent.*Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Commercial Union Assurance Company, Ltd.,
a Corporation, Defendant.)

No. 359

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That the Commercial Union Assurance Company, Ltd., a corporation, as principal and Aetna Casualty and Surety Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the defendant in error, Theodore Enders, in the full sum of Thirty-five Hundred (\$3500.00) Dollars to be paid to the said defendant, Theodore Enders, his certain attorneys, executors, and administrators, or assigns, to which payment well and truly to be made

we bind ourselves and our successors, jointly and separately by these presents. Sealed with our seals, and dated this 5th day of March, 1923.

WHEREAS, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in the said Court between Theodore Enders, plaintiff, and Commercial Union Assurance Company, a corporation, defendant, a judgment was rendered against the said defendant, Commercial Union Assurance Company, Ltd., and the said defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore Enders,, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, in the said Circuit on the 19th day of April, next.

Now the condition of the above obligation is such that if the said Commercial Union Assurance Company, Ltd., shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void.

COMMERCIAL UNION ASSURANCE
COMPANY, Ltd., a Corporation.

By George F. Shelton,

Its Attorney.

THE AETNA CASUALTY AND SURE-
TY COMAPANY.By Paul Wolcott,
*Resident Vice-President.*Attest: Sibyl G. Zabel,
*Resident Asst. Secretary.*Approved by
FRANK S. DIETRICH,
District Judge.(SEAL)
BRADY-McGOWAN COMPANY,
By F. C. McGowan,
*Resident Agent.*Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Star Insurance Company of America, a Cor-
poration, Defendant.)

No. 360.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That the Star Insurance Company, of America, a corporation, as principal and Aetna Casualty and Surety Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the defendant in error, Theodore Enders, in the full sum of Thirty-five Hundred (\$3500.00) Dollars to be paid to the said defendant, Theodore Enders, his certain attorneys, executors, and administrators, or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and

separately by these presents. Sealed with our seals, and dated this 5th day of March, 1923.

WHEREAS, lately at a District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in the said Court between Theodore Enders, plaintiff, and Star Insurance Company, of America, a corporation, defendant, a judgment was rendered against the said defendant, The Star Insurance Company of America, and the said defendant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore Enders, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, in the said Circuit on the 19th day of April, next.

Now the condition of the above obligation is such that if the said Star Insurance Company of America, shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the said plea good, then the above obligation to be void.

STAR INSURANCE COMPANY OF
AMERICA, a Corporation.

By George F. Shelton,

Its Attorney.

THE AETNA CASUALTY AND SURE-
TY COMAPANY.

By Paul Wolcott,
Resident Vice-President.

Attest: Sibyl G. Zabel,
Resident Asst. Secretary.

Approved by
FRANK S. DIETRICH,
District Judge.

(SEAL)
BRADY-McGOWAN COMPANY,
By F. C. McGowan,
Resident Agent.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Alliance Insurance Company, a Corporation,
Defendant.)

WRIT OF ERROR.

No. 357.

UNITED STATES OF AMERICA)
NINTH JUDICIAL CIRCUIT) ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Idaho, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Theodore Enders, plaintiff and Alliance Insurance Company, a corporation, defendant, a manifest error hath happened to the great damage of the said defendant, Alliance Insurance Com-

pany, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said the Circuit on the 19th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 20th day of March, A. D. 1923, and in the 146th year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
U. S. District Judge.

Attest:

W. D. McREYNOLDS,
Clerk.

(SEAL)

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a Cor-
poration, Defendant.)

WRIT OF ERROR.

No. 358.

UNITED STATES OF AMERICA)
) ss.
NINTH JUDICIAL CIRCUIT)

The President of the United States, to the Honor-
able Judge of the District Court of the United
States for the District of Idaho, GREETING:

Allowed by

Because in the record and proceedings as also in
the rendition of the judgment of a plea which is in
the said District Court, before you, or some of you,
between Theodore Enders, plaintiff, and British &
Federal Fire Underwriters of the Norwich Fire In-
surance Society, a corporation, a manifest error
hath happened, to the great damage of the said
defendant, British & Federal Fire Underwriters of
the Norwich Fire Insurance Society, as by its com-
plaint appears, we being willing that error, if any
hath been, should be duly corrected, and full and
speedy justice done to the parties aforesaid in this
behalf, do command you, if judgment be therein
given, that then under your seal, distinctly and
openly you send the record and proceedings afore-
said, with all things concerning the same, to the
United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in the said Circuit on the 19th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 20th day of March, A. D. 1923, and in the 146th year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
U. S. District Judge.

Attest:

W. D. McREYNOLDS,
Clerk.

(SEAL)

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Commercial Union Assurance Company, Ltd.,
a Corporation, Defendant.)

WRIT OF ERROR.

No. 359

UNITED STATES OF AMERICA)
NINTH JUDICIAL CIRCUIT) ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Idaho, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Theodore Enders, plaintiff and Commercial Union Assurance Company, Ltd., a corporation, defendant, a manifest error hath happened to the great damage of the said defendant, Commercial Union Assurance Company, Ltd., as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 19th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 20th day of

March, A. D. 1923, and in the 146th year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
U. S. District Judge.

Attest:

W. D. McREYNOLDS,
Clerk.

(SEAL)

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Star Insurance Company of America, a Corporation, Defendant.)

WRIT OF ERROR.

No. 360.

UNITED STATES OF AMERICA)
NINTH JUDICIAL CIRCUIT) ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Idaho, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Theodore Enders, plaintiff, and Star Insurance Company of America, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, Star Insurance Company of America, as by its complaint appears, we being willing that error, if any hath

been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 19th day of April next, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 20th day of March, A. D. 1923, and in the 146th year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
U. S. District Judge.

Attest:

W. D. McREYNOLDS,
Clerk.

(SEAL)

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Alliance Insurance Company, a Corporation,
Defendant.)

No. 357.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,)
NINTH JUDICIAL CIRCUIT,) ss.

To Theodore Enders:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 19th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein Star Insurance Company of America, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, District Judge of the United States at Pocatello, Idaho, within said Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty-three of the Independence of the United

States of America, the one hundred and forty-sixth
(146) year.

FRANK S. DIETRICH,
U. S. District Judge.

I hereby this 20th day of March, 1923, accept due personal service of this citation on behalf of Theodore Enders, defendant in error.

JONES, POMEROY & JONES,
B. W. DAVIS.

Attys. for Defendant in Error.

Filed March 20, 1923.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a Cor-
poration, Defendant.)

CITATION ON WRIT OF ERROR.

No. 358.

UNITED STATES OF AMERICA,)
) ss.
NINTH JUDICIAL CIRCUIT,)

To Theodore Enders:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 19th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District

of Idaho, wherein British & Federal Fire Underwriters of the Norwich Union Fire Insurance Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, District Judge of the United States at Pocatello, Idaho, within said Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States of America, the one hundred and forty-sixth (146) year.

FRANK S. DIETRICH,

U. S. District Judge.

I hereby this 20th day of March, 1923, accept due personal service of this citation on behalf of Theodore Enders, defendant in error.

JONES, POMEROY & JONES,

B. W. DAVIS,

Attys. for Defendant in Error.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Commercial Union Assurance Company, Ltd.,
a Corporation, Defendant.)

No. 359

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,)
NINTH JUDICIAL CIRCUIT,) ss.

To Theodore Enders:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 19th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein Commercial Union Assurance Company, Ltd., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, District Judge of the United States at Pocatello, Idaho, within said Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty-three of the Independence of the United States of America, the one hundred and forty-sixth (146) year.

FRANK S. DIETRICH,
U. S. District Judge.

I hereby this 20th day of March, 1923, accept due personal service of this citation on behalf of Theodore Enders, defendant in error.

JONES, POMEROY & JONES,
B. W. DAVIS,

Attys. for Defendant in Error.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

(Star Insurance Company of America, a Corporation, Defendant.)

No. 360.

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,)
NINTH JUDICIAL CIRCUIT,) ss.

To Theodore Enders:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 19th day of April, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein Star Insurance Company of America, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff

in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, District Judge of the United States at Pocatello, Idaho, within said Circuit, this 20th day of March, in the year of our Lord one thousand nine hundred and twenty-three of the Independence of the United States of America, the one hundred and forty-sixth (146) year.

FRANK S. DIETRICH,
U. S. District Judge.

I hereby this 20th day of March, 1923, accept due personal service of this citation on behalf of Theodore Enders, defendant in error.

JONES, POMEROY & JONES,
B. W. DAVIS,
Attys. for Defendant in Error.

Filed March 20, 1923,
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION FOR CONSOLIDATED RETURN TO WRITS OF ERROR.

WHEREAS, the above entitled actions were consolidated for trial in the above named Court, and it was ordered by the Court and agreed between the parties, that the testimony adduced by either

party to each of said actions should be applicable to all four of said actions; and

WHEREAS, one bill of exceptions for all of the four actions was prepared, allowed, settled and certified to by the Court; and

WHEREAS, separate judgments were entered against the defendants in each of the said actions and the said defendants have deemed it necessary to take separate writs of error;

NOW, THEREFORE, to facilitate the preparation of the return to said writs and to expedite the hearing of said actions, it is hereby agreed that the Clerk of said Court shall certify and transmit one consolidated record as his return to said writs of error in said actions.

Dated this 5th day of March, 1923.

JONES, POMEROY & JONES,
B. W. DAVIS,

Attorneys for Plaintiff.
GEORGE F. SHELTON,
FINIS BENTLEY,

Attorneys for Defendants.

Alliance Insurance Company, a Corporation,
British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a
Corporation.

Commercial Union Assurance Company,
Ltd., a Corporation.

Star Insurance Company of America, a Corporation.

Filed March 20, 1923,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION AS TO TRANSCRIPT OF
RECORD.

It is hereby stipulated between the parties hereto that the Clerk of this Court is making out his consolidated return to the writs of error in said actions shall include therein the following:

Complaint in No. 357.

Amendment to Complaint in No. 357.

Answer in No. 357.

Complaint in No. 358.

Amendment to Complaint in No. 358.

Answer in No. 358.

Complaint in No. 359.

Amendment to Complaint in No. 359.

Answer in No. 359.

Complaint in No. 360.

Amendment to Complaint in No. 360.

Answer in No. 360.

Order of Court consolidating for trial cases No. 357, No. 358, No. 359, No. 360.

Bill of Exceptions in consolidated cases No. 357, No. 358, No. 359, No. 360.

Judgment entered in No. 357.

Judgment entered in No. 358.

Judgment entered in No. 359.

Judgment entered in No. 360.

Petition for order allowing writ of error in No. 357.

Petition for order allowing writ of error in No. 358

Petition for order allowing writ of error in No. 359.

Petition for order allowing writ of error in No. 360.

Assignment of errors in No. 357.

Assignment of errors in No. 358.

Assignment of errors in No. 359.

Assignment of errors in No. 360.

Order granting writ of error and fixing bond in No. 357.

Order granting writ of error and fixing bond in No. 358

Order granting writ of error and fixing bond in No. 359.

Order granting writ of error and fixing bond in No. 360.

Bond in No. 357.

Bond in No. 358.

Bond in No. 359.

Bond in No. 360.

Writ of error in No. 357.

Writ of error in No. 358.

Writ of error in No. 359.

Writ of error in No. 360.

Citation in No. 357.

Citation in No. 358.

Citation in No. 359.

Citation in No. 360.

Stipulation for consolidated return to writs of error.

It is further stipulated between the parties hereto that the foregoing comprised all the papers, testimony and proceedings which are necessary to the hearing of said consolidated causes, upon such writs of error in the United States Circuit Court of Appeals for the Ninth Circuit and that no other papers or proceedings than those above mentioned need be included by the Clerk of said Court in making up his writs of error, but it is agreed that the clerk of the above Court shall certify to the Circuit Court of Appeals plaintiff's Exhibits 10, 11, 12 and 13, which exhibits may be considered by the Court as a part of the return.

Dated this 21st day of March, 1923.

T. D. JONES,

B. W. DAVIS,

Attorneys for Plaintiff.

GEORGE F. SHELTON,

FINIS BENTLEY,

Attorneys for Defendants.

Alliance Insurance Company, a Corporation.

British & Federal Fire Underwriters of the
Norwich Union Fire Insurance Society, a
Corporation.

Commercial Union Assurance Company
Limited, a Corporation.

Star Insurance Company of America, a Corporation.

Filed March 24th, 1923.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION RE: PRINTING OF TRANSCRIPT OF RECORD.

It is hereby stipulated and agreed by the parties to the above entitled actions through their respective counsel that the consolidated printed transcript therein consists of the following; it being deemed by all parties that the same comprises all parts of the record in any wise material to the consideration of said causes in the Circuit Court of Appeals in reviewing said causes on the writs of error sued out, to-wit:

Plaintiff's complaint in No. 357.

Amendment to complaint in No. 357.

Defendant's answer in No. 357.

Plaintiff's complaint in No. 358.

Amendment to complaint in No. 358.

Defendant's answer in No. 358.

Plaintiff's complaint in No. 359.

Amendment to complaint in No. 359.

Defendant's answer in No. 359.

Plaintiff's complaint in No. 360.

Amendment to complaint in No. 360.

Defendant's answer in No. 360.

Bill of exceptions in consolidated cases:

Judgment entered in No. 357.

Judgment entered in No. 358.

Judgment entered in No. 359.

Judgment entered in No. 360.

Petition for writ of error in No. 357.

Petition for writ of error in No. 358.

Petition for writ of error in No. 359.

Petition for writ of error in No. 360.

Order granting writ of error and fixing bond in No. 357.

Order granting writ of error and fixing bond in No. 358.

Order granting writ of error and fixing bond in No. 359.

Order granting writ of error and fixing bond in No. 360.

Bond in No. 357.

Bond in No. 358

Bond in No. 359.

Bond in No. 360.

Writ of error in No. 357.

Writ of error in No. 358.

Writ of error in No. 359.

Writ of error in No. 360.

Citation in No. 357.

Citation in No. 358.

Citation in No. 359.

Citation in No. 360.

Stipulation for consolidated returns to writs of error.

Stipulation as to record.

It is hereby stipulated and agreed that this printed record is printed under the supervision of the Clerk of the District Court of the United States

for the District of Idaho, under the provisions of the Act of February 13, 1911, relative to the District Court having supervision thereof.

It is hereby further stipulated and agreed by and between all the parties to these actions in the printing of this record, that all title, captions jurats, and verifications be omitted.

Dated at Pocatello, Idaho, this 21st day of March, 1923.

T. D. JONES,

B. W. DAVIS,

Attorneys for Plaintiff.

GEORGE F. SHELTON,

FINIS BENTLEY,

Attorneys for Defendants.

Alliance Insurance Company, a Corporation.

British & Federal Fire Underwriters Union

Fire Insurance Society, a Corporation.

Commercial Union Assurance Company,

Limited, a Corporation.

Star Insurance Company of America, a Corporation.

Filed March 24, 1923.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

Nos. 357, 358, 359, 360.

CLERK'S CERTIFICATE.

I. W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing pages numbered from

1 to 620, inclusive, to be full, true and correct copy of so much of the record, papers, testimony and proceedings in the foregoing entitled consolidated causes as are necessary to the hearing of said causes on writs of error therein to the United States Circuit Court of Appeals for the Ninth Circuit as is stipulated for by counsel of record therein, as the same remain of record and on file in the office of the Clerk of said District Court, with original writs of error and original citations attached, and that the same, together with all of the original exhibits in said causes, referred to in stipulation between the parties thereto, which original exhibits are transmitted herewith pursuant to the order of the Court so directing, constitute the consolidated record on return to said writs of error herein from the judgments of said United States District Court for the District of Idaho, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of this record amounts to the sum of \$716.35, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said Court, this 12th day of April, 1923.

W. D. McREYNOLDS,

(SEAL)

Clerk. B.O



